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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 365

JACK D'AGNA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES, CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

JOHN WALSH,
Counsel for Petitioner.

RICHARD H. CANTHALOU,
FRANK DESIMONE,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 365

JACK DRAGNA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Jack Dragna, the above named petitioner, prays that a Writ of Certiorari be issued by this Court to review a judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, affirming a judgment of conviction of the Municipal Court, City of Los Angeles, County of Los Angeles, State of California; and in this behalf petitioner respectfully shows:

Opinion of the Court Below

The Opinion of the Appellate Department of the Superior Court was rendered on April 25, 1952, and is reported in

the record at pages 357 to 360, and a Petition for Rehearing was denied May 5, 1952 (R. 377).

I

Summary Statement of Matters Involved

1. The Appellate Department of the Superior Court affirmed the conviction and sentence of petitioner on two counts of a complaint charging violation of Section 41.07 of Ordinance No. 77,000 of the Los Angeles Municipal Code of the City of Los Angeles, State of California, and Section 647 Sub-section 5, of the Penal Code of the State of California (R. 1).

2. The sentence affirmed was as follows:

> Thirty (30) days in the County Jail on Count I, and one hundred eighty (180) days in the County Jail on Count II, sentences to run concurrently (R. 2; 333).

That on June 5, 1952, the Trial Court on resentencing petitioner after the judgment was affirmed placed petitioner on summary probation for three years, and modified the jail sentence to thirty days on both counts to run concurrently.

3. The Complaint charged:

> Count I. ". . . on or about the 11th day of March 1951 . . . a misdemeanor, to wit: Violation of Section 41.07 of the Los Angeles Municipal Code (Ord. No. 77,000) was committed by . . . Jack Dragna . . . who . . . , did wilfully and unlawfully at and near 330 South Mariposa Street, in the City of Los Angeles, resort to a room for the purpose of having sexual intercourse and performing and participating in a lewd act with a person to whom the said Defendant was not then and there married." (R. 1.)
>
> Count II. ". . . on or about the 11th day of March 1951, at and in the City of Los Angeles, State of California, a misdemeanor, to wit: Violation of subdivision 5 of Section 647 of the Penal Code of the State of Cali-

fornia was committed by . . . Jack Dragna . . ., who at the time and place last aforesaid, was wilfully and unlawfully a lewd and dissolute person." (R. 1.)

This section of the Penal Code was attacked by petitioner as being repugnant to the due process clause of the United States Constitution and urged before the Appellate Department of the Superior Court (R. 342).

4. The evidence in support of these charges introduced by the prosecution disclosed the following facts:

(a) For eighteen months before the above criminal proceedings were instituted against petitioner, he was under police surveillance and that much of that time petitioner was under twenty-four hours a day surveillance (R. 97).

(b) That the police officers who were keeping the petitioner under surveillance under instructions and orders from their superior officer in the police department, broke into petitioner's abode at Los Angeles City address, 849 South Kenmore, which was a one-room apartment, sometime in 1950 and installed therein in an over-stuffed chair a mechanical listening device and connected the same by wire to a sound amplifying and recording machine in the basement of a neighboring apartment building, and by this process they assertedly made plastic tape recordings of this petitioner's conversations, both day and night, over a protracted period of time (R. 18); (R. 133); (R. 27, 28, 84, 182).

These tapes were not produced at the trial, the police asserting they had erased them after assertedly transmitting their contents to wax recording (R. 142; 200).

(c) That when petitioner changed his abode and moved to Los Angeles, city address 330 South Mariposa, in 1951, the Los Angeles Police Department repeated this procedure, and petitioner's home was again broken into (R. 18); (R. 133). Two mechanical listening devices were installed therein. One device was placed in a chair in petitioner's living room (R. 99). The other device was installed by the police officers in

the headboard of the petitioner's bed in his bedroom (R. 24, 25). One of these listening devices installed was connected by wires to a tape recording machine in a neighboring building (R. 19), and to the second listening device wires were connected which were strung and ran to an outside telephone pole where they dangled loose from the pole (R. 100).

(d) The police in autos stopped in the public street before the petitioner's abode, watched the activities of petitioner through spyglasses through his window (R. 19); (R. 29, 54); (R. 173) and connected up a listening device to the wires dangling from the pole to overhear petitioner's conversations and made tape recordings in the neighboring apartment of all conversations and sounds emanating from the petitioner's abode, making records of every intimate detail of petitioner's life (R. 173); (R. 104); (R. 114).

(e) The police shadowed petitioner constantly, placing themselves in a position to overhear conversations between petitioner and other persons in public restaurants and buildings (R. 39); (R. 41); (R. 43).

The police took photographs of petitioner dining in a public cafe (R. 51 (Peo. Ex. "A")).

The police harassed the petitioner, following him over the public highways in police cars (R. 40).

The police unlawfully arrested, held, and released the petitioner's son without cause (R. 101).

(f) That, over the specific objections and motions to strike of petitioner (R. 55 to 64, 69); (R. 147, 148); (R. 184; 203; 241) the trial court admitted testimony of police officers as to two or three asserted conversations between the petitioner and a woman in the abodes of petitioner above referred to, assertedly overheard by the police through the medium of the mechanical listening devices hereinbefore referred to (R. 69, 70, 77; 87, 95, 96; 190).

That these asserted conversations constituted substantially all the evidence in support of Count I and Count II charged in the complaint.

The rulings of the trial court on the objections of petitioner that the evidence was illegally obtained in

violation of petitioner's State and Federal constitutional rights were assigned as erroneous and were argued before the Appellate Department of the Superior Court as erroneous (R. 342; 345; 348) and considered by that court (R. 358), which held, "It is true that the evidence was obtained as the result of a flagrant violation of the principle that a man's home is his castle."

5. The trial court at the request of the prosecution instructed the jury as follows:

> "You are instructed that it is lawful for any (regular salaried) peace officer to install and use a dictograph in any house, room, or apartment, where (expressly) authorized by the head of his office or department, when such use or installation is necessary in the performance of their duties in detecting crime and in the apprehension of criminals." (R. 298; 321, 322).

This instruction was given by trial court by virtue of Section 653h of the Penal Code of the State of California. This instruction was urged before the Appellate Department of the Superior Court as erroneous and that Section 653h of the Penal Code of the State of California was in violation of and repugnant of the Constitution of the United States (R. 342; 345; 348; 349).

6. The Trial Court at request of prosecution when defining the offense of vagrancy upon which petitioner is being prosecuted (California State Penal Code Section 647 sub. 5) instructed the jury as follows:

> "You are instructed that Webster's Unabridged Dictionary defines dissolute as 'loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." (R. 293; 319).

II

Jurisdictional Statement

The jurisdiction of this court is invoked under Section 1257 of Title 28 of the United States Code. Said judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles is a final judgment (Calif. Const. Art. VI Sec. 4, 4b & 5). That the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is the highest court of the State of California in which a decision of this case could be had (*Calif.* v. *Zook*, 336, U. S. 725, *Buck* v. *Calif.*, 82 L. Ed. 377 at 382). That your petitioner contends that he has been deprived of due process of law, all as guaranteed to him by the Fourteenth Amendment to the United States Constitution by the governmental agencies of the State of California in that:

(1) Petitioner's case was submitted by the prosecution to a jury in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California for a decision on the question of his guilt or innocence on misdemeanor criminal charges. That the evidence relied upon the support of petitioner's conviction was illegally obtained without a search warrant and as the result of an unreasonable search and through arbitrary intrusion by the local police into petitioner's personal privacy. (See Summary Statement of Matters Involved—Supra.)

(2) That Section 647, Subdivision 5 of the California State Penal Code, the provisions of which your petitioner was prosecuted for violating, is vague and uncertain in its effort to describe a public offense and affords no ascertainable standard of accountability, and your petitioner's prosecution thereunder was a denial to him of due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution. The interpretation of this offense the trial court gave the jury (at petitioner's trial) in

its charge to them (R. 293; 319) so broadened the scope of the statute to include innocent acts and made it more vague and uncertain, so that the enforcement of this statute against petitioner constituted a denial of due process of law, all as guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

(3) That Section 653h of the Penal Code of the State of California is an affirmative sanction by the legislative branch of the state government of California of illegal police incursion into petitioner's privacy, and constitutes a violation of the guarantee of due process of law as contained in the Fourteenth Amendment to the Constitution of the United States. The state trial court in giving an instruction incorporating the language of this code section (R. 298; 321, 322), and charging the jury that it was lawful for the police to install and use a dictograph in petitioner's home without his permission and solely upon the expressed authority of the head of the police department was a judicial sanction of a substantial violation of a personal right of this petitioner to be secure in his house against unreasonable search, which right is safeguarded by the due process of law clause of the Fourteenth Amendment to the Federal Constitution.

That these rights under the Constitution of the United States as above enumerated were specially set up by your petitioner in the state courts.

III

How Federal Questions Raised in Trial Court

The stages in the proceedings in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California (the court of first instance) at which and the manner in which the federal questions sought to be reviewed were raised in that lower court are as follows:

(1) That the question of the introduction of the illegally obtained evidence as set forth in the next

preceding sub-paragraph (1) was raised by objection to its introduction on federal constitutional grounds during the course of the trial. (R. 147, 148); (R. 184, 203); (R. 241); and by motions to strike such illegally obtained evidence from the record after it was admitted by the trial court. (R. 147, 148); (R. 241).

(2) The giving of instructions by the trial court defining the offense of vagrancy as set forth in Section 647, Subdivision 5 of the Penal Code of the State of California (R. 293; 319); and (R. 319), was under Penal Section 1259 of the State of California, automatically deemed objected to by your petitioner in the trial court by virtue of the fact that substantial rights of your petitioner were affected thereby.

(3) The giving by the trial court of an instruction to the jury which instruction embodied the language of California State Penal Code Section 653h (R. 298; 321, 322) was automatically deemed objected to in the trial court under the provisions of California State Penal Code Section 1259 by virtue of the fact that the substantial rights of this petitioner were affected thereby.

IV

How Federal Questions Were Raised in Appellate Court

The state of the proceedings in the Appellate Department of the Superior Court, of the State of California, in and for the County of Los Angeles, at which, and the manner in which, the federal questions sought to be reviewed were raised are as follows:

(1) Your petitioner specifically assigned as error in the Appellate Department the overruling of petitioner's objections in the trial court to the introduction of evidence illegally obtained by the police in contravention of the petitioner's personal rights as guaranteed said petitioner by the Constitution of the United States. (R. 342); (R. 345); (R. 348).

(2) That your petitioner in his statement on appeal as an assignment of error asserted that Section

647, Subdivision 5 of the Penal Code of the Sta tate of California was a violation of due process of of law clause and in contravention of and repugnant t to the Constitution of the United States (R. 342). That at your petitioner further assigned as error the givin ing by the trial court of the dictionary definition of the e word dissolute as an instruction to the jury, said petiti itioner asserting such instruction was indefinite, confu nfusing and unintelligible. (R. 349).

(3) That your petitioner in his statement on ap- peal assigned as error the admission of evidenc nce ille- legally obtained by city police officers under c color of authority of Section 653h of the Penal Cod ode of the State of California because it was in contra traven- tion of the defendant's federal constitutional gua guaran- tee and in deprivation of defendant's civil ri rights. (R. 342; 345, 348).

V

Manner in Which Federal Questions Disposed of by Appellate Court

The manner in which the federal questions were so sought to be were passed on by the Appellate Department o of the Superior Court of the State of California, in and fo for the County of Los Angeles, was as follows:

(1) In regard to the constitutional question o of the production and admission at the trial of your ur petitioner of illegally obtained evidence, the Appe ppellate Department in its memorandum opinion declared red:

"It is true that the evidence was obtained a as the result of a flagrant violation of the principle t that a man's home is his castle. We do not interpret ret Section 653th, Penal Code, as authorizing that such uch was done, and know of no authority other than th that of expediency that justified it. The time may come ne when it will be held that evidence so obtained may n not be used in the courts of the states, as it is now be banned

from the federal courts. That is not now the rule in this state, however." (R. 358, 359).

(2) In regard to the question of the constitutionality of Section 647, Subdivision 5 defining the crime of vagrancy and the interpretation given it by the trial court in its instruction to the jury, the Appellate Department of the Superior Court declared:

"We are strongly inclined to the view that the word 'dissolute,' if given its dictionary definition, is too broad a word validly to create the crime of vagrancy. For example, a man may be 'unashamed' and yet not guilty of conduct that may lawfully be made a public offense. In upholding the constitutionality of subdivision 5 of Section 647, Penal Code, the court, in *People* v. *Babb* (1951), 103 Cal. App. 2d 326, 330, 229 P. 2d 843, 846, employed a more limited definition of the word 'dissolute'."

The Appellate Department of the Superior Court, however, went on to say that this erroneous instruction did not in their opinion prejudice your petitioner. (R. 359).

(3) In regard to the question of the constitutionality of 653h of the Penal Code of the State of California incorporated by the trial court in a jury instruction (R. 298, 321, 322), the Appellate Department of the Superior Court in its memorandum opinion declared:

"We do not interpret Section 653h, Penal Code, as authorizing that which was done, and know of no authority other than that of expediency that justified it". (R. 358).

Petitioner has specifically quoted from the memorandum opinion of the Appellate Department of the Superior Court of the State of California for loss of a clearer manner of presenting his complaint that he has been flagrantly deprived of due process of law as guaranteed him by the Fourteenth Amendment to the United States Constitution.

VI

Questions Presented

The questions herein presented are as follows:

QUESTION 1.

Does evidence obtained by local police in the State of California as the result of a "flagrant violation of the principle that a man's home is his castle", when admitted against a person in a criminal prosecution of the state court, constitute a denial to him of the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution?

QUESTION 2.

Is it a denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States to prosecute a person on and to enforce against a person a California State Penal Statute (Section 647, Subdivision 5) which is itself uncertain and made more vague and uncertain by a trial court's instruction to the jury that broadens the scope of such a penal statute to include innocent acts?

QUESTION 3.

Where a California state law (Penal Code Section 653h affirmatively sanctions arbitrary police intrusion into a person's privacy solely upon the express authority of the head of the Police Department or the District Attorney, does such a statute run counter to the due process guarantee as contained in the Fourteenth Amendment to the United States Constitution.

QUESTION 4.

Is the due process of law clause of the Fourteenth Amendment of the United States Constitution heedless of the manner in which evidence is obtained for use in state courts, or as otherwise stated, is a person de-

nied his federal constitutional rights to due process where the local police after extended and persistent surveillance and harassment of a person, under color of authority gathered from a statute such as Section 653h of the Penal Code of the State of California, subject a person within the State of California to the deprivation of his personal right to be secure in his home by breaking and entering the home without permission, or any judicial order, and installing and maintaining therein a dictagraph through which medium all conversations of such person over a period of months are recorded and used as evidence to convict him in a misdemeanor criminal prosecution in a state court?

VII

Reasons Relied upon for Issuance for Allowance for Writ

Reason 1

That the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, in the instant case, decided a federal question of substance in favor of the respondent and against your petitioner as to said petitioner's constitutional guarantee of due process of law under the Fourteenth Amendment to the United States Constitution. The state court held in substance that due process of law is heedless of the means by which relevant evidence is obtained. That evidence obtained by the local police "in flagrant violation of the principle that a man's home is his castle" is properly admissible at the trial in the California State Courts and can be used to convict a person of a public offense, which decision is not in accord with the decisions of this court, including the case of *Rochin v. California*, 72 Supreme Court 205, 96 Lawyer's Edition, 154.

Reason 2

That the Appellate Department of the Superior Court of the State of California, in and for the County

of Los Angeles, decided a federal question of substance involving the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution. The Appellate Department in its memorandum opinion held that petitioner's conviction under the provisions of Section 647, Subdivision 5 of the Penal Code of the State of California declaring every lewd and dissolute person to be a vagrant was sustainable even though the trial court in interpreting such vague and uncertain statute for the jury broadened its scope to include innocent acts and made the statute still more vague and uncertain. The said Appellate Department in effect ruling against petitioner's specific objection made to said court that through the statute and by the instruction interpreting the same your petitioner was denied due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution. That this decision of the State Court is not in accord with the decision of this Court, including the cases of *Stromberg v. California*, 283 U. S. 359, 75 Lawyer's Edition 1117; *Winters* v. *New York*, 333 U. S. 507, 92 Lawyer's Edition 840; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *L. Cohen Grocery Co.*, 225 U. S. 81, 65 Lawyer's Edition 516.

REASON 3

A decision of this court is necessary to determine whether a state statute (California Penal Code Section 653h) which affirmatively sanctions and allows the installation and use by the police of a dictagraph in a person's home without his permission when the District Attorney or Chief of Police expressly authorized such installation and use for the purpose of obtaining evidence to be introduced against such a person in a criminal prosecution is repugnant to and in contravention of the due process of law clause contained in the Fourteenth Amendment of the United States Constitution. That the decision of the Appellate Department of the Superior Court of the State of California, in and

for the County of Los Angeles on the foregoing proposition is not in accord with the decision of this court, including the cases of *Wolf v. Colorado,* 338 U. S. 25, 93 Lawyer's Edition 1782; *Steffanelli v. Minard,* 96 Lawyer's Edition 99.

Petitioner presents to this Court and files herein as an Exhibit hereto, a duly certified transcript of the entire record in the case as the same appears in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, to the end that the errors aforesaid may be corrected by this Court.

JOHN WALSH,
Attorney for Petitioner.

RICHARD CANTILLON,
FRANK DESIMONE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

I

Opinion of the Court Below

The memorandum opinion of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is to be found at Page 357 to Page 360 in the record.

II

Jurisdiction

1. The judgment of the Appellate Department of the Superior Court to be here reviewed was rendered on April 25, 1952 (R. 360). A petition for rehearing which was duly filed was denied by the Appellate Department of the Superior Court on May 5, 1952 (R. 377). That on July 24, 1952 upon application duly made by your petitioner the Honorable Harold H. Burton, Associate Justice of this Honorable Court, made an order extending the time for filing a petition for a writ of certiorari in this court to and including September 30, 1952.

2. The jurisdiction of this court is invoked under Section 1257, Subdivision 3 of the Judicial Code. In the petition the requirements of Rule 12 (1) (Paragraph 3rd) are fully complied with and said petition contains a summary statement of the matters involved, and jurisdictional statement how the federal questions were raised in the trial court, how the federal questions raised in the Appellate Court and the manner in which the federal questions were disposed of by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

3. The petitioner was prosecuted based upon a complaint containing two misdemeanor counts (R. 1). Count One charged the petitioner with resorting to a room for the purpose of illicit sexual relations (R. 1). Count Two charged the petitioner with being a vagrant in that peti-

tioner is a lewd and dissolute person. All the evidence produced by the prosecution to support these respective charges was illegally obtained through a flagrant violation of the principle that "a man's home is his castle". This proposition is conceded by the Appellate Department of the Superior Court (R. 358), which held in effect that such evidence so illegally obtained was nevertheless admissible in the state court of California to support the conviction of your petitioner, and the Appellate Department ruled against objection and in so doing overruled petitioner's objection to said evidence on the ground that the admission of the same against him was a denial to him of due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution (R. 358, 359).

Section 647, Subdivision 5 of the Penal Code of the State of California which is the Penal provision upon which count II of the complaint is based, simply declares every lewd and dissolute person to be a vagrant. This statute petitioner contended does not furnish a sufficient standard of accountability for the government of human conduct because it is by its terms too vague and uncertain, and a prosecution thereunder constitutes a denial to a person of due process of law (R. 319; 342). The Appellate Department of the Superior Court ruled against petitioner's contention (R. 359), which was squarely before that court on an assignment of error (R. 342). The jury instruction given by the trial judge defining the word dissolute so broadened the scope of the offense (violation of California State Penal Code, Section 647, Subdivision 5) so as to include innocent acts (R. 293; 319). This proposition was conceded by the Appellate Department (R. 359), which endorsed the constitutionality of the Penal Code Section and held that the definition given by the trial judge so broadened the language of the penal statute so as to include innocent acts did not prejudice the defendant or to in any effect deny him due process

of law as guaranteed by the Fourteenth Amendment of the United States Constitution (R. 359). That section 653h of the Penal Code of the State of California which the trial court considered as vesting the right in the local police to break into a person's home solely upon the express authority of the head of the Police Department (R. 298; 321, 322) and to install and use a dictograph in said home to hear and record all conversations and use them as evidence against your petitioner at his trial is in effect a state legislative sanction of police incursion into a person's privacy. The Appellate Department of the Superior Court overruled petitioner's objections and assignments of error based upon the unconstitutionality of this penal code section (R. 358, 359).

That all these federal questions were duly presented by petitioner in accordance with California state practice and procedure, and the same were presented for the decision of the highest court of the state having jurisdiction over the subject matter (R. 342, 345; 348; 349). A decision on these respective federal questions was necessary to a just determination of your petitioner's cause. It is apparent from the very nature of the federal questions raised in the memorandum opinion of the Appellate Department that the judgment as rendered by the Appellate Department could not have been given without passing upon these federal questions. That all of the matters above recited involve questions concerning the guarantee of due process of law as contained in the Fourteenth Amendment to the United States Constitution and as it related to the prosecution of your petitioner on criminal charges in the state courts of California.

4. The cases believed to sustain said jurisdiction are as follows: *Rochin* v. *California,* 72 Sup. Ct. 205, *Wolfe* v. *Colorado,* 338 U. S. 25, *Stefanelli* v. *Minard,* 96 Lawyer's Edition 99, *Connolly* v. *General Construction Co.,* 296 U. S. 385, *Lanzetta* v. *New Jersey,* 306 U. S. 451, *United States* v.

Cohen Grocery Co., 255 U. S. 81, *Stromberg* v. *California*, 283 U. S. 359, *Herndon* v. *Lowry*, 301 U. S. 242, *Winters* v. *New York*, 333 U. S. 507.

III

Statement of Case

This has already been stated in the preceding petition for review by certiorari under paragraph I at Page 2 to Page 6 of said petition, which statement of the case is hereby adopted and made a part of this brief, by reference.

IV

Specification of Errors

1. The Appellate Department of the Superior Court erred in holding that evidence obtained as the result of "a flagrant violation of the principle that a man's home is his castle" is properly admissible in a criminal prosecution in a California state court and that such police practice is not repugnant or in contravention of the due process of law guarantee as contained in the Fourteenth Amendment to the Constitution of the United States.

2. Section 653h of the Penal Code of the State of California is a legislative sanction of arbitrary police incursion into privacy for the purpose of obtaining evidence for a criminal prosecution against a person without judicial authority and therefore, runs counter to the guarantee of due process of law contained in the Fourteenth Amendment to the United States Constitution, and the Appellate Department of the Superior Court was in error in failing to so hold.

3. That the Appellate Department of the Superior Court erred in holding that the manner in which relevant evidence is obtained for use in a state court

in a criminal prosecution is not within the purview of the due process of law clause of the Fourteenth Amendment to the United States Constitution.

4. That the Appellate Department of the Superior Court erred in not holding Section 647, Subdivision 5 of the Penal Code of the State of California as so vague and uncertain in its terms so that a prosecution thereunder in the state court constituted a denial of the guarantee of due process of law as contained in the Fourteenth Amendment to the Constitution of the United States.

5. That the Appellate Department of the Superior Court erred in not holding the jury instruction given by the trial judge defining the vague and uncertain statute creating the offense of vagrancy in such terms that it broadened the scope of the statute so as to include innocent acts and made said statute more uncertain, was a denial to your petitioner of due process of law, all as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Argument I

Due Process of Law Is Not Heedless of the Manner in Which Evidence Is Obtained

The following argument supports the contention of petitioner under this specification of error number -1- and number -3-.

The Appellate Department of the Superior Court declared the evidence produced against petitioner at his trial was obtained as the result of a flagrant violation of the principle that a man's home is his castle (R. 358).

The Fourteenth Amendment to the United States Constitution Provides That No State Shall Deprive Any Person of "Life, Liberty or Property Without Due Process of Law."

The phrase "due process of law" as it applied to the use of illegally obtained evidence in criminal proceedings in the State of California has been limited to the right that the criminal trial be fair and impartial.

People v. *Gonzales*, 20 Cal. 2d 165.

The rule has been laid down repeatedly by the courts of California that they will not be concerned by the manner in which the evidence produced at the trial was obtained.

People v. *Mayen*, 188 Cal. 237;
In re Polizette, 128 Cal. 410;
People v. *LeDoux*, 155 Cal. 535;
Herrscher v. *State Bar*, 4 Cal. 2d 399.

The only exception that the courts of this state recognized to the above rule was in the case of confessions forcibly obtained.

People v. *Gonzales, supra*, citing:

Palko v. *Connecticut*, 302 U. S. 319;
Chambers v. *Florida*, 309 U. S. 227;
Brown v. *Mississippi*, 297 U. S. 278;
Twining v. *New Jersey*, 211 U. S. 78.

This exception exists in California, not because the confession was obtained in an illegal manner contrary to the immunities guaranteed a citizen by the "due process clause." It exists because such evidence so obtained is so unreliable that its use against a defendant in a criminal trial prevents the trial from being fair and impartial, and thereby denies to the defendant "due process of law."

People v. *Gonzales, supra.*

The second day of January, 1952, the Honorable Supreme Court of the United States expressly rejected the California rule that a defendant in a criminal case is only denied "due process of law" when the trial is not fair or impartial.

Rochin v. *California*, 7 Sup. Ct. 205.

The People introduced into evidence capsules containing morphine which were illegally sequestered from the abdomen of the defendant. There was nothing in the nature of the evidence itself, or in the manner in which it was obtained that rendered it so unreliable that its use at the trial would deprive the defendant of a fair and impartial trial.

Rochin v. *California*, 72 Sup. Ct. 205.

The United States Supreme Court did declare "*It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible* evidence is obtained." (Emphasis ours.)

Rochin v. *California, supra.*

The United States Supreme Court reversed the California judgment solely because of the manner in which the evidence was obtained when it stated that due process of law is a summarized constitutional guarantee of respect for those personal immunities so rooted in the traditions and conscience of our people as to be ranked fundamental and implicit in the concept of ordered liberty.

Rochin v. *California, supra.*

Argument II

This argument is given in support of specification of error number 2.

Section 653h of the Penal Code of the State of California is repugnant to the due process of law clause of the Fourteenth Amendment to the United States Constitution.

Penal Code Section 653 (h) was in full force and effect at the time of the police incursions upon the rights of the defendant, guaranteed him under the United States Constitution and the California Constitution, and reads as follows:

> "653h. UNAUTHORIZED INSTALLATION OF DICTOGRAPHS: GRADE OF OFFENSE: PERSONS EXEMPTED. Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; *provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney, when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.* (Added by Stats. 1941, ch. 55, Sec. 1.) (Emphasis ours.)

The trial court instructed the jury as follows:

> "You are instructed that it is lawful for any (regular salaried) peace officer to install and use a dictograph in any house, room or apartment, where (expressly) authorized by the head of his office or department, when such use or installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals." (R. 298; 321, 322).

The United States Supreme Court has declared heretofore that:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is a basis to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such is enforceable against the States

throughout the Due Process Clause. . . . *Accordingly, we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.*"

Wolf v. *Colorado*, 338 U. S. 25;
Stefanelli v. *Minard*, 96 L. Ed. 99.

ARGUMENT III

Section 647, Subdivision 5 of the Penal Code is so vague and indefinite in its terms so that the prosecution of your petitioner thereunder constituted a denial to him of due process of law all as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

The argument is here made in support of specification of error number 4.

Section 647, Subdivision 5, as it pertains to the charge against your petitioner reads:

"Every . . . lewd or dissolute person . . . is a vagrant."

These terms are of themselves indefinite and uncertain and afford no ascertainable standard of guilt.

The United States Supreme Court has held that a person, who has been convicted of the violation of a statute so vague and indefinite in its terms that men of common intelligence must necessarily guess its meaning, has been denied due process of law within the meaning of the due process clause of the Fourteenth Amendment.

Connaly v. *General Construction Co.*, 296 U. S. 385;
Lanzetta v. *New Jersey*, 306 U. S. 451;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Stromberg v. *California*, 283 U. S. 359 at 369;
Herndon v. *Lowry*, 301 U. S. 242 at 258.

Argument IV

The jury instruction defining Section 647 Subdivision 5 of the Penal Code was erroneous and the giving of the same resulted in a denial of due process of law to your petitioner.

The argument here made is in support of specification of error number 5.

The trial court gave the following instruction:

> "You are instructed that Webster's Unabridged Dictionary defines dissolute as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched" (R. 293, 319).

The Appellate Department of the Superior Court in its memorandum opinion declared the dictionary instruction given was too broad and that a man may be "unashamed and still not be guilty of a public offense" (R. 359).

The United States Supreme Court has refused to affirm a conviction under a statute which is itself uncertain when the court's interpretation makes it all the more vague and broadens its scope. The United States Supreme Court has stated that to enforce such a statute would be to deny the defendant due process of law because such a statute so interpreted leaves open the widest scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

Winters v. *New York,* 333 U. S. 507.

Petitioner calls the attention of the Honorable Court that there is pending before it now a case involving the constitutionality of California State Penal Code, Section 647, Subdivision 5. (*Edelman* v. *People of the State of California.*)

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated: September 9, 1952.

Respectfully submitted,

JOHN WALSH,
Attorney for Petitioner.

(4052)

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IN THE

Supreme Court of the United States

October Term, 1952

No. 365.

JACK DRAGNA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to the Granting of Petition for Writ of Certiorari.

To the Honorable Fred Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Jack Dragna, was charged in a verified complaint with having violated the provisions of Section 41.07 of the Los Angeles Municipal Code, and of violating the provisions of a portion of subdivision 5 of Section 647 of the Penal Code of the State of California [R. 1].

The evidence revealed that petitioner was followed by members of the Los Angeles Police Department for some period of time [R. 96-97]. Dictagraphs were installed at the direction of a commanding officer of the Police Department in several apartments where petitioner and one Annette Eckhart were seen. At an apartment on

Kenmore Avenue equipment was maintained for a period of two or three months, and later at an apartment on Mariposa Street for some two months [R. 18; 99; 107; 110; 132]. The use of these microphones did not in any way tap telephone wires [R. 48; 202]. At the Kenmore address a microphone had been placed in a chair, and at the Mariposa address a microphone had been placed in the headboard of the bed [R. 25; 48-49; 84; 134].

Petitioner and Annette Eckhart were seen together in other places during this period [R. 39; 41; 51; 180].

Listening posts were provided where the officers were able to listen in and hear the conversations of these parties. The officers who listened were acquainted with Jack Dragna and Annette Eckhart, having spoken to them, and were familiar with their voices [R. 17-18; 19; 27-28; 117; 119].

Petitioner was not married to Annette Eckhart but rented apartment 7 at 330 South Mariposa Street as "Mr. and Mrs. John and Annette Eckhart." He paid the rent there on several occasions [R. 204-205; 215-216].

On March 11, 1951, petitioner and Annette Eckhart went into the apartment house at about 1:30 A. M. A light was seen to go on in the bedroom of apartment 7. The officers took up their positions at the listening post and heard and identified the voices of these persons [R. 19-20; 120-121]. The conversation and noises heard indicated that sexual intercourse and acts of sex perversion

were taking place in this room between these persons [R. 69-71; 103-104; 114; 122-124; 162; 182].

Conversations between these persons heard in June of 1950, at the Kenmore address, were related by the officers which also indicated the character of petitioner to be that of a lewd and dissolute person [R. 78; 87; 95-96; 128-129; 130-131; 190].

The petitioner did not take the stand nor offer any evidence to rebut any of the implications of the conversations attributed to him [R. 7-8].

From this evidence the jury concluded that on the date alleged petitioner, with Annette Eckhart, did resort to the bedroom of apartment 7 to engage in sexual intercourse or to perform and participate in a lewd act and that from all the evidence of conduct and conversation of petitioner, that he was a lewd and dissolute person [R. 8; 329].

The Appellate Department of the Superior Court of Los Angeles County affirmed the judgment of conviction stating that "The evidence was sufficient to support the conviction on each count," and that "Throughout the trial of this case counsel for both parties cooperated with the trial court and with each other to avoid incidents that would result in a trial unfair either to the defendant or to the People. We are of the opinion that their efforts proved successful. A conviction is obviously not an indication that a trial was in any way unfair. The defendant was convicted on sufficient evidence without prejudicial irregularities." [R. 357-360.]

I.

Evidence Obtained by Use of Microphones Does Not Offend Due Process of Law.

The rule adopted by the United States Courts concerning the admissibility of evidence obtained by the use of microphone or by wire-tapping is not followed in California. In California it is established and universally recognized that, where competent evidence is produced and offered, the court will not inquire into or investigate its source or the means by which it was obtained.

Evidence obtained by illegal search and seizure does not affect its admissibility, and although a defendant may have civil or criminal remedies against the officers by reason of their unlawful acts, the state may nevertheless use the evidence so illegally obtained.

People v. Channel, 107 Cal. App. 2d 192, 199;

People v. Kelley, 22 Cal. 2d 169, 173;

People v. Gonzales, 20 Cal. 2d 165.

It has been stated that a criminal trial does not constitute a denial of due process of law so long as it is fair and impartial, and that the use of evidence through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial.

People v. Gonzales, supra, pp. 170, 171.

This court in *Wolf v. Colorado,* 338 U. S. 25, stated:

> "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons,

> together with those who emerge scatheless f
> search, to the remedies of private action anrom a
> protection as the internal discipline of the l such
> under the eyes of an alert public opinion, may police,
> Granting that in practice the exclusion of evafford.
> may be an effective way of deterring unreasidence
> searches, it is not for this court to condemn as onable
> below the minimal standards assured by the Dufalling
> cess Clause a State's reliance upon other me Pro-
> which, if consistently enforced, would be equaethods
> fective . . . We hold, therefore, that in a prlly ef-
> tion in a State court for a State crime the Fourosecu-
> Amendment does not forbid the admission of evteenth
> obtained by an unreasonable search and seizure idence
> . . ."

A complete answer to petitioner's arguments I and II is found in the decision of the District Court of Appeal in the case of *People v. Sica*, 112 A. C. A. 671, decided August 7, 1952, petition for hearing denied by California Supreme Court September 4, 1952. The defendants were prosecuted for a conspiracy to carry on a bookmaking enterprise and much of the evidence had been obtained through the installation of a dictaphone in the defendants' place of business and by the establishment of a listening post some 300 feet away. Defendants urged that the trial court erred in admitting the testimony of the police officers with respect to conversations heard by this means as being in violation of the Federal and State Constitutions. The District Court of Appeal stated in its decision affirming the convictions:

> "The constitutional protection of the Fifth Amendment against compulsory self-incrimination may not be invoked as a restriction on a state court to prevent the use of otherwise competent evidence allegedly obtained by illegal means, so long as the

requirements of the due process clause of the Fourteenth Amendment are not infringed. (*Adamson v. California*, 332 U. S. 46, 54 [67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223]. See *People v. Gonzales, supra*, p. 170.) The vitality of these cases is not undermined by the decision in *Rochin v. California*, 342 U. S. 165 [72 S. Ct. 205, 96 L. Ed. .....], where the court specifically held that the evidence objected to was obtained in a manner so shocking to the established traditions of American justice, in view of the brutal treatment inflicted on defendant by police officers, as to offend the concept of a fair trial as embodied in the due process clause of the Fourteenth Amendment. (See *People v. Kendall*, 111 Cal. App. (2) ....., ... [244 P. 418].) No such claim is advanced by defendant in the case at bar. Neither do the circumstances of their arrest nor the conduct of the law enforcement officials even remotely parallel the events condemned by the United States Supreme Court in the Rochin case . . .

"Furthermore, the record shows that the recordings of the telephone conversations were made not by any mechanical interception (wiretapping) but through the use of a microphone which transmitted the conversations to the recording instrument and to the listening post. Even in the federal courts, where evidence obtained by wiretapping is excluded (*United States v. Bernava*, 95 F. 2d 310; *Nardone v. United States*, 302 U. S. 379 [58 S. Ct. 275, 82 L. Ed. 314), the use of a microphone to overhear a telephone conversation is considered neither as wiretapping nor an interception of a communication within section 605 of the Federal Communications Act. (*Goldman v. United States*, 316 U. S. 129, 133-134 [62 S. Ct. 993, 86 L. Ed. 1322].) Since the dictaphone was not physically connected with any tele-

phone wire, section 640 of the Penal Code has no application to the facts of this case. Section 653h of the Penal Code, which makes the unauthorized installations of dictagraphs on certain designated premises a misdemeanor, permits a peace officer who is expressly authorized by the head of his department to use and install such instruments 'when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.' The evidence indicates a compliance with that section. . . .

"The failure of these defendants to deny their participation in any of the recorded conversations justified the jury in drawing an inference unfavorable to them on this issue. (California Constitution, Act 1, sec. 13; *People v. Adamson,* 27 Cal. 2d 478, 490-491 [165 P. 2d 3].)"

The use of dictaphones has been held to be a lawful means of detecting crime, and not to be a violation of any constitutional provision, State or Federal.

Goldman v. United States, 316 U. S. 129.

The reasonable use of dictagraphs by peace officers in the performance of their duties is sanctioned by reason, by judicial precedent and by statutory enactment, and evidence obtained through wire-tapping, or by the use of dictagraphs or dictaphones without the knowledge or consent of the persons under investigation, is not inadmissible as the result of an unreasonable search or seizure within the meaning of the Fourth Amendment.

Olmstead v. United States, 277 U. S. 438;

Goldman v. United States, 316 U. S. 129.

Recording of incriminating conversation made without the knowledge of the person against whom it is used as evidence is essentially the same as evidence of a conversation directly overheard. There is no more reason to exclude the one than the other.

United States v. Schanerman, 150 F. 2d 941, 944.

Evidence obtained by eavesdropping, strategem, or by an investigator as a feigned accomplice is not subject to objection because of the manner in which is is obtained.

Sorrels v. United States, 287 U. S. 435.

The use in a federal criminal case of testimony as to damaging admissions by the accused in a conversation on the premises of the accused which the witness, outside such premises, was enabled to overhear by radio transmitter concealed on the person of the other party to the conversation, was held not to violate the constitutional immunity of the accused from unreasonable searches and seizures, not to be within the prohibition of the Federal Wire Tapping Act, and not to be inconsistent with fair play in federal law enforcement in the case of *On Lee v. United States,* 96 L. Ed. Adv. Op. No. 16, page 770. On page 774, this court stated:

> "The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure,

> even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment. . . ."

And on page 776:

> "We think the administration of justice is better served if stratagems such as we have here are regarded as raising, not questions of law, but issues of credibility. . . ."

It should be noted that petitioner alleges that microphones were placed in "petitioner's home." (Pet. p. 3.) However, there is no evidence in the record to support such statement. The facts revealed that petitioner was not married to Annette Eckhart [R. 204-205]. The only reasonable inference to be drawn from this evidence was that he merely rented and kept Mrs. Eckhart at the apartment. The constitutional guarantee from unreasonable searches and seizures should apply only to "one's home" and not to the home of another. Petitioner did not testify where his actual home was and thus failed to show that his rights were violated. The officer in fact gave testimony that this apartment was where Mrs. Annette Eckhart lives [R. 19]. If any complaint of an unreasonable search or seizure is to be made, it should be by her and not one who is a mere visitor engaged in immoral conduct at such premises.

II.

Subdivision 5 of Section 647 of the Penal Code of the State of California Is Constitutional and Is Not Repugnant to the Constitution.

Penal Code, section 647, subdivision 5, provides:

> "Every idle, or lewd, or dissolute person, or associate of known thieves; . . . is a vagrant and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Petitioner was charged with being a lewd and dissolute person in violation of the above provisions [R. 1].

Due process of law requires criminal statutes to be sufficiently certain and definite to inform citizens of the acts which it is intended to prohibit. The requirements of reasonable certainty do not preclude the ordinary terms to express ideas which find adequate interpretation in common use and understanding.

Sproules v. Binford, 286 U. S. 374, 393.

In answer to an attack on this section as being vague and uncertain, the District Court of Appeal in the case of *In re McCue, 7* Cal. App. 765, stated:

> ". . . But this cannot be said of lewdness or dissoluteness—terms often used interchangeably but each of which applies to the unlawful indulgence of lust, whether in public or private . . . The elements of lewdness and dissoluteness, under the accepted definition of those terms, comes directly within the inhibited practices and are proper subjects of regulation and prohibition . . . The constitutional right of due process of law will not be given

effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society. (Lent v. Tillson, 72 Cal. 425 [14 Pac. 71.]) One charged, as was petitioner, with being an idle, lewd and dissolute person is sufficiently advised of the character of his offense. To say that the legislature must specify the many evil and corrupt practices which might constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary."

Respondent directs the attention of this court to a decision of the Appellate Department of the Superior Court of Los Angeles County in the case of *People v. Stompanato*, Cr. App. 2566. It was there held that the words "idle" and "associate of known thieves" found in subdivision 5 of Section 647, Penal Code, were too vague and uncertain to serve successfully as a part of a statute creating a crime, and that where a complaint charged these provisions the judgment must be reversed if based upon either of these charges. Since said decision, no complaints have been issued charging one to be a vagrant by reason of being an "idle" person or "associate of known thieves."

The District Court of Appeal of the State of California, in the case of *People v. Babb*, 103 Cal. App. 2d 326, held this subdivision and section to be constitutional as against a contention that it failed to state a public offense. The court held the terms "lewd" and "dissolute" to be terms often used interchangeably; that each applied to the unlawful indulgence in lust, whether in public or private; that "lewd" was defined to mean lustful, libidinous,

lascivious and unchaste; "dissolute" to mean loose in morals and conduct, wanton, lewd and debauched.

In the case of *State v. Harlow,* 174 Wash. 227, the court held a similarly worded statute to be constitutional. The court said the words "lewd," "disorderly" and "dissolute" are words of common and general use, and are easily understood by men and women of average intelligence; that it doubted whether definition could make them clearer.

In the case of *People v. Scott,* 113 Cal. App. (Supp.) 778, the Appellate Department of the Superior Court of Los Angeles County stated that where the legislature of a state has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended; that "dissolute" was defined to mean loosed from restraint, recklessly abandoned to sensual pleasures, profligate, wanton, lewd and debauched.

The word "lewd" when applied to dancing is generally and unmistakably understood to mean indecent, lascivious, lecherous, tending to excite lustful thoughts. It was stated by the court in *State v. Rose,* 147 La. 243, 84 So. 643, that if these words were contained in the statute, they would amount to nothing but tautology, which is no more desirable in a statute than in a newspaper article.

The following language is taken from the case of *Winters v. New York,* 333 U. S. 507:

> "This court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. We have the same attitude toward federal statutes. Only a definite conviction by a majority of this

Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.

"The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct . . ."

From the above it would appear that the word "lewd" has been declared by this court to be well understood and properly used in criminal law and removed from the class of words which may be said to be vague.

The Appellate Department of the Superior Court of Los Angeles County has held the portions of subdivision 5 of Section 647, Penal Code, as here charged to be constitutional against challenges similar to those set forth in the petition herein filed. That court stated:

"We were and are satisfied that these statutes do not violate either the California or the Federal Constitution, whether for uncertainty for infringement of constitutional rights or otherwise."

People v. Elliott, Cr. App. 2446;

People v. Brown, Cr. App. 2447.

We submit that the words "lewd" and "dissolute" are words of common knowledge and understanding and are defined in all standard dictionaries. Any person of average intelligence is sufficiently advised of the character of an offense if such words are the basis of the statute and complaint. It is noted that petitioner had no difficulty in understanding the nature of this charge in order to

enter his plea. The docket entries of the Municipal Court show that no demurrer for uncertainty or for any other reason was filed but that at the time of arraignment, he entered a plea of not guilty and that the matter proceeded to trial after one continuance [R. 3-4].

III.

The Instructions Given Were Proper.

In considering claimed errors in the giving or refusal of instructions, it is the duty of an appellate court to consider the entire cause, including the evidence, to determine whether a miscarriage of justice has resulted.

People v. Cook, 15 Cal. 2d 507.

A single instruction or a portion of an instruction cannot be considered separately from the entire charge.

People v. Frazier, 88 Cal. App. 2d 99.

To determine whether the law is properly declared for the guidance of the jury, the charge as a whole and not an isolated excerpt is to be examined.

People v. Jordan, 24 Cal. App. 2d 39.

In passing upon the correctness of the instructions given in this case, the Appellate Department of the Superior Court found that no miscarriage of justice resulted to petitioner [R. 359].

The instruction here claimed erroneous is supported by the definition of the word "dissolute" in Webster's Unabridged Dictionary and the case of *People v. Scott,* 113 Cal. App. 778. The instructions as a whole fully, fairly and accurately advised the jury of the law applicable to the case submitted to them for decision [R. 310-324].

IV.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236.

As pointed out under Point I, the decisions of the California Supreme Court have held it proper to admit evidence, if competent, and will not inquire into or investigate its source or the means by which it was obtained. The admissibility of the evidence here presented was properly received in support of the charge that petitioner was a lewd and dissolute person. The offense of vagrancy differs from most other offenses in the fact that it is chronic rather than acute and continues after it is complete. It depends for its establishment upon proof of the character of the accused. Because of this it is proper in support of the charge to prove conduct of the defendant over a period of time which tends to indicate that character.

People v. Scott, 113 Cal. App. (Supp.) 778, 783;
People v. Craig, 152 Cal. 42, 47.

A person's intent may be proved by his words.
10 Cal. Jur. 1073.

The evidence of a defendant's words and acts clearly warrant the inference that he is a lewd character, "For as he thinketh within himself so is he." (Prov. 23:7.)

The decisions of the courts of California have consistently upheld the validity of the portion of the section

herein involved as set forth in Point II hereof and such decisions should be controlling upon this court as applied to the laws of the State of California.

V.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not heretofore determined by this court. The authorities hereinbefore cited clearly show that the decision of the highest court of the State of California actually decided the questions of this case in complete accordance with the decisions of this court. The record discloses that petitioner was convicted on two counts and received concurrent jail sentences [R. 13] and that no question is here presented concerning the judgment of conviction on Count I which charged a violation of Section 41.07 of the Los Angeles Municipal Code.

The People of the State of California pray that the petition be denied.

Respectfully submitted,

RAY L. CHESEBRO,
DONALD M. REDWINE,
PHILIP E. GREY,

By PHILIP E. GREY,

Attorneys for Respondent, The People of the State of California.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 465

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WARREN E. MILLER,
Counsel for Petitioner,
910 17th St., N. W.,
Washington 6, D. C.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Air Transport Associates, Inc., petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on July 10, 1952 (R. 1110), which order affirmed an order of the Civil Aeronautics Board [1] revoking petitioner's license as an air carrier and prohibiting it from continuing to engage in air transportation.

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[1] Hereinafter referred to as "the Board."

Opinions Below

The opinion (R. 15-25) of the Board is partially reported at 1A Avi. L. R., 21,406 (CCH). The dissenting opinion by Adams, Member, Civil Aeronautics Board (R. 25-26) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 1101-1110), is not yet reported.

Jurisdiction

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on July 10, 1952 (R. 1110), and petitioner's Motion to Hold in Abeyance pending decision by this court of questions involving the validity of respondent's regulation, which had been certified to the court,[2] and for a Rehearing, were denied on October 3, 1952 (R. 1143).

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[2] The opinion of this Court, entered October 20, 1952, in *C.A.B.* v. *American Air Transport*, case No. 126, October Term, 1952, stated:

"*Per Curiam.*

"The certificate is dismissed. *Labor Board* v. *White Swan Co.*, 313 U.S. 23 (1941); *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160 (1936); *White* v. *Johnson*, 282 U.S. 367 (1931); *United States* v. *Union Pacific R. Co.*, 168 U.S. 505 (1897).

"The Civil Aeronautics Board has applied to this Court for an order requiring the Court of Appeals to send up the entire record. To grant such an applicatian would bring 'the entire matter in controversy' before the Court for decision. 28 U.S.C. sec. 1254(3).

"Since the certificate must be dismissed, the Court should not exercise its discretionary power to bring up "the entire matter in controversy' for review. See *Cleveland-Cliffs Iron Co.* v. *Arctic Iron Co.*, 248 U.S. 178 (1918). Perhaps the Court of Appeals may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case. This Court does not normally review orders of administrative agencies in the first instance; and the Court does not desire to take any action at this time which might foreclose the possibility of such review in the Court of Appeals.

"For these reasons the Board's application is denied.

"MR. JUSTICE DOUGLAS dissents."

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1), and Section 1006(f) of the Civil Aeronautics Act, as amended, 52 Stat. 1025, 49 U.S.C. 646(f).

Questions Presented

1. Where a license granting operating authority is issued by the Board to an air carrier, which acquires property and business while operating thereunder, may the Board thereafter issue and lawfully enforce a new regulation which amends the carrier's license and substantially injures and destroys its property interests and business by diminishing and curtailing its operating authority, in the absence of an adjudicatory hearing upon the regulation prior to its issuance as prescribed by the Administrative Procedure Act?

2. Under the foregoing circumstances, in which no question of safety is involved, could the court below properly conclude that the amended regulation (which imposes a crippling restriction upon the permissible number of flights of petitioner, and thus substantially injures and in large part destroys petitioner's existing property and business) is a reasonable or proper definition of the terms "regularly or with a reasonable degree of regularity"[3] as previously

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[3] Section 292.1 of the Board's Economic Regulations effective July 15, 1948, and in force when letter was written petitioner transmitting its authority to commence business (R. 343) provided:

"• • • (b) Classification. There is hereby established a classification of non-certificated air carriers to be designated as 'Irregular Air Carriers'. The term 'irregular air carrier' means any air carrier which (1) directly engages in air transportation, (2) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, or (3) does not operate or hold out to the public, expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, *regularly or with a reasonable degree of regularity* upon which aicraft it accepts for transportation, for compensation or for hire, such members of the public as apply therefor or

prescribed for the original license, in the absence of evidence and studies of actual operations of regular and irregular carriers?

3. Where a license is granted pursuant to a regulation adopted through proper rule-making procedure, which regulation defines permissible operations in general terms (i.e., "does not hold out a regular service"), and a licensee commences operations and makes a business investment in reliance upon such regulation, may the agency thereafter lawfully issue a document called an "interpretation" but having the force of a regulation, which document substantially curtails and restricts the prior definition of permissible operations without complying with the rule-making procedures set forth in the Administrative Procedure Act?[4]

4. In cases involving the revocation of irregular air carriers' licenses because of frequency of operations, may the Board reject and refuse to consider evidence of the "development of its business and the demands of the public"[5] for such transportation and evidence of the extent to which a carrier served the public demands and public interest in the operations upon which the complaint was brought?

5. If the Board believed petitioner's operations violated the so-called "interpretation" of the regulation, should not

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such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. * * * Within the meaning of this definition a 'point' shall mean any airport or place where aircraft may be landed or taken-off, including the area within a 25-mile radius of such airport or place."

[4] 5 U.S.C. 1008(b).

[5] Sec. 401(f) Civil Aeronautics Act, 49 U.S.C. 481(f) provides in part:

". . . No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. . . ."

the agency have followed, in the words of Member Adams who dissented below,

> "the more orderly procedure of issuing a cease and desist order prior to considering revocation"? (R. 25)

6. Unless a cease and desist order or other document is issued in the name of, and by authority of, *the agency*,[6] calling the attention of the licensee to conduct which would warrant revocation, may the agency lawfully revoke the license in view of the provisions of the Civil Aeronautics Act[7] and the Administrative Procedure Act?[8]

7. Where there was a dispute between petitioner and the chief of one of the subordinate offices of an agency with respect to the legality and interpretation of a regulation not involving safety, may the agency resolve the dispute against the carrier, at the same time declare its conduct to constitute "willfulness" and then, without issuing an order commanding obedience and giving petitioner an opportunity to first achieve compliance, lawfully issue an order which:

> (1) declares petitioner to be in "willful" violation,
> (2) orders it to "cease and desist" from operating in violation of the Board's interpretation of the regulation, and
> (3) simultaneously revokes its license?

Statutes and Regulations Involved

The pertinent sections of the Civil Aeronautics Act and the Administrative Procedure Act here involved are set forth in the Appendix to this petition.

Summary of the Matter Involved

Petitioner, Air Transport Associates, Inc., is a large irregular carrier, engaging in the air transportation of per-

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[6] All italics in this petition supplied unless otherwise indicated.

[7] Sec. 401(h) Civil Aeronautics Act, 49 U.S.C. 481.

[8] 5 U.S.C. 1008(b).

sons and property. Petitioner commenced its operations in July, 1948. At that time the Board had in effect a regulation which permitted a large irregular air carrier to engage in air transportation without a certificate of public convenience and necessity (R. 352-364). A "large irregular" carrier was defined as an air carrier "which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points . . . regularly . . ." (R. 358). The regulation further required an irregular air carrier to apply for and obtain a Letter of Registration. Petitioner acquired such a Letter of Registration and provided a new and specialized type of air service, particularly a low cost air coach service for passengers and a low cost air freight service. Petitioner was able to provide an air coach service between these places at substantially lower charges than other airlines charged for their de luxe services. The charges were established by tariffs duly filed with the Board. Petitioner's low cost operations are in the public interest and serve the little people who make up the bulk of Americans—the working people, the housewives, the soldiers, the sailors and the family groups.

After petitioner acquired its license, the Board, on December 10, 1948, announced, *without notice or hearing*,[9] a so-called "Interpretation Number 1" (R. 57-63) of its regulations governing large irregular air carriers. This interpretation contained a series of examples of permissible and nonpermissible operations, each of which considerably altered and changed the extent of the service which petitioner was permitted to perform under the previous regulation. Specifically, the interpretation adopted, without fol-

[9] And not complying with either rule-making or adjudicatory procedures prescribed by §§ 4(a) and 5(b) of the Administrative Procedure Act. 5 U.S.C. 1003(a) and 1004(b)

lowing either rule-making or adjudicatory procedures, altered petitioner's license in the following respects:

> 1. For the first time, "breaks" in service were required, and such breaks were stated to be in terms of weeks, whereas theretofore there was no requirement that a carrier suspend for any period of time the operations between any two cities;
> 2. The interpretation was so written that trips on more days per month would have to be considered in excess of the limit permitted irregular carriers.

The Board also adopted other regulations without any adjudicatory hearings, each of which placed new and additional interpretations upon the extent to which large irregular carriers could provide a public service. On May 20, 1949, the Board terminated the blanket exemption for large irregular carriers and provided for the termination of the Letters of Registration unless individual application for a special exemption order was seasonably filed. Petitioner complied with this requirement, but its application for exemption has not yet been finally determined by the Board.

After petitioner had been operating its low cost service for 18 months, respondent, on December 28, 1949, directed petitioner to show cause (R. 71-73) why its Letter of Registration should not be revoked.

No question of public safety is involved in the instant case. No question of improper treatment of any passenger or shipper is involved. The only part of petitioner's operations involved in this proceeding is the number of trips upon which petitioner provided low cost air service between the United States and Alaska.

After hearing, the Board issued an Opinion and Order (R. 15-30) which revoked petitioner's Letter of Registration and directed petitioner to cease and desist from engaging either directly or indirectly in air transportation. Member Adams

dissented from the decision to summarily stop petitioner's operations (R. 25). The sole reason assigned by the Board for its order is that petitioner operated more frequently and regularly than the Board considered permissible under its regulations.

Petitioner filed a petition for review (R. 1-63) of the Board's action in the United States Court of Appeals for the District of Columbia Circuit. That court affirmed the order of the Board (R. 1100-1110), but stayed the effective date of the order pending the filing of this petition for certiorari (R. 1150-1151).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the regulation used by the Board as a basis for revoking petitioner's license, adopted December 10, 1948 (R. 57-63), was lawful and properly applicable to petitioner when that regulation, which amended petitioner's license and substantially injured and destroyed its property and business by diminishing and curtailing its pre-existing operating authority, was not adopted as a result of either a rule-making or adjudicatory procedure (R. 1108).

2. In holding that the "interpretation" and the subsequent regulations issued without adjudicatory hearings, even if such regulations were lawfully promulgated, did not establish new criteria for determining whether flights were frequent and regular (R. 1108), because such regulations did adopt new and different standards and thereby destroyed petitioner's property and business rights by imposing a crippling restriction upon the permissible number of flights.

3. In affirming the Board's decision in the absence of

evidence as to whether the regulation sought to be enforced against petitioner was a reasonable definition of the previously undefined term "regularly or with a reasonable degree of regularity," because without this evidence, the decision of the court below conflicts with the applicable decision of this court in the case of *Brady Transfer and Storage Co.* v. *United States*, 80 Fed. Supp. 110, affirmed in 335 U. S. 875, 93 L. Ed. 418, 69 S. Ct. 239.

4. In holding that the Board complied with the requirements of law[10] that *the agency* call the attention of the licensee to facts or conduct which might warrant a withdrawal of the license, before instituting proceedings therefor, and providing petitioner with an opportunity to achieve compliance before its license was revoked.

5. In holding that it was not necessary for the Board to take into consideration the nature of the services performed by irregular air carriers operating between the United States and Alaska when it attempts to apply to petitioner the new regulations including the "interpretation" adopted December 10, 1948 without any kind of notice or hearing.

6. In failing to pass upon petitioner's contention that the Board improperly rejected evidence of the development of petitioner's business, the "demands of the public" for such transportation, and the extent to which petitioner served the "public interest" in the operations against which the complaint is made.

7. In affirming the Board's decision, when the Board's regulation upon which its decision was based, erroneously applied standards designed for domestic air transportation to petitioner's operations between the United States and Alaska, where different economic conditions exist.

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[10] 5 U.S.C. 1008(b); Section 401(h), Civil Aeronautics Act, 49 U.S.C. 481(h).

8. (a) In affirming the Board's holding that flights to Paine Field and Boeing Field, which are 26 miles apart, were flights to the same point.[11]

(b) In holding that petitioner "held out a regular Seattle service by means of Paine flights."

9. In holding that the interpretation or amendment to the regulation adopted December 10, 1948, was not a "just and reasonable regulation" as required by Section 416 of the Civil Aeronautics Act (49 U.S.C. 496).

Reasons for Granting the Writ

This case presents a question of public importance relating to the application of the Civil Aeronautics Act with respect to the impact upon the irregular carrier segment of the air transportation industry, of a regulation limiting the frequency and regularity of operations of such air carriers. This regulation is presently being enforced against many air carriers in proceedings now pending before the Board and proceedings under judicial review. Its validity is challenged here and in these other proceedings. This is the first time this question is before this court for decision, although the court below filed with this court a statement on June 12, 1952 (No. 126, October Term, 1952), certifying four questions to this court for determination, two of which are presented in the instant case. In certifying questions to this court, because of three conflicting views by the Circuit judges, the Court of Appeals stated in their certificate to this court that it was their unanimous opinion that these questions were "of far reaching and fundamental importance in the field of administrative law." While this

[11] Part 291.1(b) of the Economic Regulations of the Board, effective July 1, 1949, provides:

". . . The term 'point' as used in this part shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place."

court dismissed the certificate, this court recognized the importance of the issues by suggesting that the Court of Appeals may wish to hear the case *en banc*.[12] The same fundamental issue is here involved. Unless the court takes jurisdiction of this case and decides this important question in the field of administrative law, the validity of the Board regulation and similar regulations adopted in the same way by other governmental agencies without complying with the requirements of the Administrative Procedure Act will remain unsettled.

A decision by this court now will be helpful to not only petitioner and every other irregular air carrier of which 55 transported more than 55 million passenger and cargo miles (R. 637), for the period July, 1949 through June 1950, but should likewise be helpful to and welcomed by respondent in its duty in administering the Civil Aeronautics Act.

As was pointed out by the Senate Committee which investigated the status of the carriers in the class to which petitioner belongs [13] the operations of these irregular carriers, sometimes termed "nonscheduled" carriers, required a bare minimum of 14 to 15 flights a month between the same points as economically necessary to justify their continued operations. The regulation in question, if valid, jeopardizes the economic strength of these carriers to such an extent that they cannot continue their operations and meet their operating expenses. Petitioner, as well as the other members of this important industry—small businessmen—respectfully urges this court to recognize their predicament by taking jurisdiction in the instant case and granting the relief to which they believe they are justly entitled under the law.

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[12] Instead the Court of Appeals remanded the case for taking evidence of actual operations of regular and irregular carriers.

[13] Senate Select Committee on Small Business, Senate Report No. 540, 82nd Congress, First Session.

As was pointed out by the Senate Committee, the regulation of irregular carriers involves not merely the legitimate right of citizens to engage in a competitive enterprise, but also "involves a broader public interest—that of determining the kind of civil aviation which America is to have in the future [14] and "it is the opinion of the Committee that the nonscheduled air carriers constitute an asset that the Nation ought not to lose."

Petitioner, as well as the 54 other irregular carriers,[15] many of whom are involved in enforcement proceedings involving this same regulation, are vitally concerned in the issue of whether this regulation was lawfully promulgated. Petitioner here urges that the regulation was not adopted through procedures which comply with the Administrative Procedure Act.[16]

If this regulation is valid, it will have the effect of practically eliminating this important segment of our air transportation industry, which brings low cost transportation within range of the working man, the housewife, the soldier, the sailor—the middle income group of working Americans.

The regulations adopted December 10, 1948 and July 1, 1949 violate the due process clause of the Fifth Amendment in that they were invalid for uncertainty and were discriminatory because they imposed a classification with accompanying restrictions upon irregular carriers without any reasonable relation to the purpose of the Civil Aeronautics Act.

The new regulations amend petitioner's license in fact, by prescribing more restrictive rules; this action deprived petitioner of the utilization of its property in a lawful business.

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[14] Page 18 of above report.

[15] Page 19 of above report.

[16] Section 9(b), 5 U.S.C. 1008(b) and Sections 4(a) and (b), 5 U.S.C. 1003(a) and (b).

Petitioner was granted an authorization to operate and was engaged in business. Petitioner made the necessary investment and began his operations; he has a license. *Standard Airlines* v. *Civil Aeronautics Board,* 85 App. D.C. 29, 177 F. 2d, 18.

As was said in re: *Carter* 177 F. 2d 75:

> "Once granted, the license becomes a right and due process of law must be followed to achieve deprivation. This is true, even though the license is a severely qualified one, such as a radio license.[17] . . . the deprivation of that right, once granted, is a judicial act, requiring due process of law."

The regulation of December 10, 1948 deprived petitioner of property rights and to be valid must be the result of an adjudicatory hearing. In no other way can there be due process of law. *Columbia Broadcasting Company* v. *United States,* 316 U.S. 407; *Interstate Commerce Commission* v. *Louisville and N. R. Company,* 227 U.S. 88, 93. It follows, therefore, that the amended regulation formed no basis upon which to measure the legality of petitioner's conduct.

This case presents an important issue in the field of administrative law which this Court should pass upon. The court below apparently did not realize the full significance of the arguments which petitioner advanced. There are here involved two regulations, one of which, it is submitted, is void for failure on the part of the Board to comply with rule-making requirements. The other may not be lawfully applied to petitioner unless adjudicatory hearings are first held.

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[17] Citing *National Broadcasting Co.* v. *Federal Communications Commission,* 319 U.S. 239, and *Ashbacher Radio Co.* v. *Federal Communications Commission,* 326 U.S. 327.

The December 10, 1948 Regulation

The Board adopted a general regulation permitting the air carriers to operate on a nonscheduled or irregular basis. The Board defined an irregular carrier as one "which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points regularly." After petitioner had secured its operating rights under this general regulation and had made an investment relying upon such regulation, the Board issued, on December 10, 1948, an "interpretation" of the meaning of the previously undefined terms "regularly" or "with a reasonable degree of regularity." This "interpretation" was not adopted in accordance with the rule-making provisions of the Administrative Procedure Act. No notice was given and no opportunity was given petitioner or anyone else to participate in making the definition. Petitioner has demonstrated that the new interpretation and definition substantially curtails and injures petitioner's business. Petitioner sought to show in the proceeding before the Board that the definitions contained in the new interpretation should not be applicable to operations between the United States and Alaska. The Board refused to accept this evidence. Without complying with the Administrative Procedure Act, the Board issued its "Interpretation" on December 10, 1948 (see appendix 47) which is in effect a new regulation. An analysis of the standards fixed by the new regulation shows clearly that for the first time it required an irregular carrier to have "breaks in service." While nonscheduled operations under the old regulation were partly of a nonrecurring nature, it was never believed by the industry that operations between the same two points for two weeks would necessarily have to be followed by a complete cessation of all flying between the same points for a similar period of two weeks.

Irregular carriers believed that they could provide nonscheduled service over substantially longer periods of time. For example, some operated between New York and Miami during the winter season which lasts for several months. Petitioner and others operated most of their flights to Alaska during the summer season when the migratory fishermen and cannery workers demanded additional air services. The "Interpretation", however, has limited seasonal service to periods of weeks instead of to periods of months.

The 1949 Regulation

The old (1947) regulation provided that a carrier could operate on a nonscheduled basis if it did not hold out to the public that it would operate a regular service between designated points. There was no limitation upon the number of trips to be operated. The 1949 regulation states that an irregular carrier may not *operate* or hold out a regular service. This is a real change in the nature and character of the nonscheduled business. Under the 1949 regulation, as under the December 10, 1948 regulation or "Interpretation", a carrier can no longer operate an unlimited number of trips. The 1948 and 1949 regulations thus constituted a new and severe restriction on petitioner's business and a drastic alteration of petitioner's license.

The court below failed to recognize that there was a distinction between the 1947 and the later Dec. 10, 1948-July 1, 1949 [18] regulations. It is these later regulations which are of paramount importance to irregular air carriers. Obviously, they are not the same as the 1947 regulation.

The Board should have considered petitioner's evidence with respect to the difference between operations within the United States and operations to Alaska either at the time the Board announced its interpretation or at the time

[18] See appendix for these 3 regulations.

the Board attempted to force petitioner to comply with this interpretation. The Court below fell into basic error by not recognizing this point. The Administrative Procedure Act was expressly designed for the purpose of permitting licensees operating under Federal regulatory authority to participate in the formulation of regulations. That is the purpose of Section 4 of that Act (5 U. S. C. 1003).

There exist basic, inherent, deep and fundamental differences in the type and character of air transportation services performed by petitioner between Seattle and Anchorage and Fairbanks, Alaska, and those customarily performed by other large irregular air carriers within the continental United States. These differences must be recognized in order for the Board to properly regulate this service in the interest of the people of Alaska and to afford just regulation of petitioner's activities.

The first and most important of Alaska's air transportation needs is for adequate, low-cost cargo service. The evidence presented in the *Alaska Service Case* (C.A.B. Docket No. 3286, *et al.*) indicated that Alaska uses 15 times the amount of passenger air transportation *per capita* as does the continental United States, confirming that air transportation is used by all income levels in the absence of alternative forms of transportation; and that Alaskans use 114 times more air cargo transportation per capita, proving that air cargo transportation is needed more than passenger transportation.

While cargo service in the continental United States is principally expedited packages, much of the cargo transported to Alaska constitutes the necessities of everyday life, chiefly airborne perishables. These commodities are the produce, fruits, fresh eggs, meat and fresh milk that reach most Anchorage and Fairbanks households. Lack

of these commodities would seriously affect the standard of living of Alaskans, who do not have the alternative rail, bus and motor freight services which are available in the States, whereas lack of air cargo service in the United States would, at most, be only an inconvenience.

Unlike large irregular air carrier service within the United States, which is handled almost solely in all-passenger loads at a higher profit margin, petitioner in its U. S.-Alaska operations must do a volume operation on combination cargo-passenger service at a low profit margin. Its necessary frequency or volume of service, therefore, has been the cause of the Board's enforcement action. The economic conditions giving rise to the enforcement action were peculiar to the Alaska-U. S. service and hence the regulations applicable to domestic transportation between the States are inapplicable, although the Board in its enforcement order has applied regulations governing domestic flights to overseas flights between Seattle and Alaska. This is an erroneous application of the regulation which does not recognize the underlying economic principles. To apply the domestic regulations to overseas Alaskan operations is fundamentally and basically wrong because of the surrounding circumstances.

An Alaskan Task Force, appointed by the United States Senate, in its seventh report to the Senate of the Preparedness Subcommittee of the Committee on Armed Services, under the authority of S. Res. 18, 82nd Congress, First Session, gave the results of its study of Alaska from the standpoint of national defense. The Chairman of that Committee, in his Letter of Transmittal of the Report, dated February 13, 1951, stated:

> "At the outset of the Preparedness Subcommittee's work, we agreed that no outpost of America's defenses was of greater strategic importance than Alaska. To ascertain the state of our defenses in Alaska, three-

member task force—Senator Hunt, chairman; Senators Morse and Saltonstall—undertook an on-the-site investigation. The investigation has been supplemented by extensive studies and inquiries here in Washington. The result of their painstaking, diligent, and vigorous labors is the attached report.

"A strong Alaska is essential to our security. Our continental defenses can be no stronger than our Alaskan defenses. The security of every American home begins in the snows of Alaska."

In this report (at page 54) it was stated:

"Vast distances and rugged terrain have made the airplane the accepted medium of transportation in Alaska. The percentage of freight and passengers transported by air is 30 times higher in Alaska than in the United States. In addition, air travel has done much to promote the growing Alaskan tourist industry."

The conclusions of this Committee mentioned the fact that (at page 38):

". . . Regulations that are designed to meet the requirements of commercial flying in interstate commerce in the United States should not be applied within Alaska unless local conditions indicate that they are desirable."

The Board, to a limited degree, has recognized the necessity for greater frequency of flights between the States and Alaska because conditions peculiar to the Territory of Alaska would make such a limitation unduly restrictive over that permitted in domestic service (R. 759). Petitioner, realizing that its service was in a peculiar or different class as recognized by the Board than the domestic transportation permitted by Part 291.16 of the Board's Economic Regulations, believed the Board would define permissible frequency and regularity by a cease and desist

order (R. 760) if its final decision was that petitioner's operations were in excess of those permitted, and proceeded on the premise that the Board would allow a greater latitude of frequency and regularity to Alaska than elsewhere because of the different economic conditions there and would, by its cease and desist order, indicate such permissive regularity and frequency. This was the action the dissenting Board member felt should be taken in this case (R. 25-26) as had been followed in other cases handled by the Board in dealing with this problem. However, instead of issuing such an order, the Board revoked petitioner's license for knowingly and willfully violating the regulations without giving petitioner an opportunity to achieve compliance.

The failure in this case to give adequate notice and opportunity for compliance is just as much a "hacking away" at the Administrative Procedure Act as the Board's action in attempting to limit irregular carriers to 3 and 8 trips per month, which action was recently held to be invalid by Judge Bastian in *American Air Transport, et al.* v. *Civil Aeronautics Board, et al.*, 98 F. Supp. 660, which was certified to this Court. (See footnote 2.)

The Examiner's conclusion as set forth at the top of page 19 of his report (R. 547) that

> ". . . anything less than revocation of the existing authority of the carrier will be unsuccessful in obtaining compliance by this carrier with the provisions of the Civil Aeronautics Act and the rules and regulations issued thereunder * * *"

is illogical and a conclusion clearly erroneous because it is obvious that if petitioner's Letter of Registration is revoked, it will be in no position to comply with any rule or regulation issued under the Civil Aeronautics Act.

Therefore, the very purpose of proposing sanctions upon this petitioner is defeated by the sanction imposed.

THE COURT ERRED IN FAILING TO PASS UPON PETITIONER'S CONTENTION THAT THE BOARD IMPROPERLY REJECTED EVIDENCE OF THE DEVELOPMENT OF ITS BUSINESS, AND THE "DEMANDS OF THE PUBLIC" FOR SUCH TRANSPORTATION TO THE EXTENT TO WHICH PETITIONER SERVED THE "PUBLIC INTEREST" IN THE OPERATIONS AGAINST WHICH THE COMPLAINT IS BASED.

As petitioner, after being issued a license to operate, is entitled to the same protection as if he had a certificate as mentioned in Section 401 of the Civil Aeronautics Act (see argument in Point 4 above), he is likewise entitled to the protection afforded by Section 401(f) of the Civil Aeronautics Act which, when given effect, nullifies the action of the Board in revoking petitioner's license.

It has been the long standing policy of this Government to refrain from "freezing" the development of the country's transportation business in accordance with the demands of the public. That principle is written in Section 401(f) of the Civil Aeronautics Act. That language, it will be observed, is, in part, identical with the language contained in the Motor Carrier Act.[18a] Therefore, the development of the business and the demands of the public and the public interest is a cloak of protection thrown around

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[18a] 49 U.S.C. 481(f) provides "• • • No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service *as the development of the business and the demands of the public shall require.*"

49 U.S.C. 308(a) provides:

"• • • Provided, however, That no terms, conditions, or limitations (in the certificate) shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, *as the development of the business and the demands of the public shall require.*"

petitioner here, of which he has been stripped by the action of the court below in approving the decision of the Board, which body rejected and refused to consider evidence establishing the demands of the public and the public interest which petitioner served so well in meeting the public demand and public interest that the Board revoked its license.

THE COURT ERRED IN HOLDING THAT THE CIVIL AERONAUTICS BOARD COMPLIED WITH THE REQUIREMENTS OF LAW THAT THE AGENCY CALL THE ATTENTION OF THE LICENSEE TO FACTS OR CONDUCT WHICH MIGHT WARRANT A WITHDRAWAL OF THE LICENSE, BEFORE INSTITUTING PROCEEDINGS THEREFOR, IN ORDER THAT PETITIONER HAVE OPPORTUNITY TO ACHIEVE COMPLIANCE BEFORE ITS LICENSE WAS REVOKED.

Member Adams of the Civil Aeronautics Board directly raised this issue by his dissenting opinion. He said (R. 25-26):

> "I dissent, however, from the decision to revoke the Letter of Registration of Air Transport Associates, summarily stopping its operation, without first issuing an order to the carrier to *'cease and desist'* from continuing violations of the Board's regulations. The more orderly procedure of issuing a cease and desist order, prior to considering revocation of a Letter of Registration, has been followed in a majority of the cases handled by this Board in dealing with the problem of irregular carriers. I find no justification for taking a short cut in this case."

The court below (R. 1109) held that Section 401(h) of the Civil Aeronautics Act, requiring that the Board shall fix, *by its order*, a reasonable time within which to achieve compliance with any rule claimed to be violated, relates to public convenience and necessity and has no application here.

Section 401(a) of the Civil Aeronautics Act states that no carrier shall engage in air transportation without a cer-

tificate. This provision of law contradicts the conclusion of the court below. The mere fact that the Civil Aeronautics Board issued what it termed a "Letter of Registration" instead of terming this a "certificate" indicates that within the meaning of Section 401(a), such letter certainly is the equivalent of a certificate. No one can doubt that it was ~~not~~ the intention of the Board to issue a permit for petitioner to engage in air transportation. Certainly the fundamental protection given by the Civil Aeronautics Act cannot be brushed aside upon the mere technicality of words, as was attempted by the court below. Letters of Registration and certificates are both licenses and, as such, are equally entitled to the protection granted by the Civil Aeronautics Act.

This license or "Letter of Registration" was issued to encourage small operators to invest their capital and services in the development of air transportation, and the letter issued to petitioner achieved that result in this case. To hold that petitioner's investment is deprived of the protection afforded by the Act merely because the Board did not see fit to use the word "certificate" when it issued petitioner's license is no valid reason for depriving petitioner of the benefits afforded by the Act.

Consequently, petitioner is entitled to have a cease and desist order issued before its license is revoked. Such order must show in writing what violations are claimed and designate when compliance must be achieved. No such order having been issued in the instant case, it follows that the Board's order of revocation was unlawful.

This case presents an important question of due process of law. After an administrative agency adopts a regulation, pursuant to rate-making procedures, and a licensee relying on the regulation engages in business thereunder and acquires property and a business in so doing, the

agency promulgated a new regulation which, in fact, substantially injures or in large part destroys the licensee's property interests and business, without following the rule-making procedures, such action is void as to that licensee, unless an adjudicatory hearing is held because it is on its fact an amendment of the license. Under the same circumstances, does the validity of such new regulation as to the license depend upon a finding of fact that it does or does not in face vary the terms of the license?

On November 20, 1952, the court below remanded the case of *Civil Aeronautics Board, et al.* v. *American Air Transport, Inc., et al.* (United States Court of Appeals No. 11,115 and No. 136 in this court) to the District Court for further proceedings in accordance with the opinion dated June 12, 1952, of the judge who previously voted to remand the case. That opinion was as follows:

> "One judge is of opinion (1) that the decisive question is whether the specific prescriptions of the new Regulation are or are not a proper, or reasonable, definition of the undefined terms ('regularly or with a reasonable degree of regularity') of the original licenses and (2) that that question is a question of fact which must be determined upon factual criteria, devised from studies of actual operations of regular carriers and of irregular carriers, similar to the criteria utilized by the three-judge court in *Brady Transfer & Storage Co.* v. *United States*[19] for like purposes under the Motor Carrier Act, and similar to the data which the Board says it used in formulating the Regulation here involved. Since the present record contains no evidence of that sort, this judge would remand the case to the trial court for the receipt of such evidence and a finding of basic facts and an ultimate finding therefrom as to whether the new Regulation does

[19] 80 F. Supp. 110 (S. D. Iowa 1948), aff'd [illegible] 69 S. Ct. 239 (1948).

or does not in fact change the terms of the existing licenses."

In the course of the proceeding before the Board, petitioner submitted evidence to show that in the absence of the operation of irregular services, such as petitioner had previously conducted, the regular carriers were unable to meet an existing public demand. The Board rejected such evidence and refused to consider it (R. 733). In the case of *CAB et al.* v. *American Air Transport, Inc., et al., supra,* the court below held that in order to determine whether the prescriptions of a new regulation issued by the Board are proper that such a determination must be made "upon factual criteria devised from studies to regular carriers and of irregular carriers." In the instant case the Board refused to consider such evidence.

In affirming the decision of the Board, the Court below necessarily holds that such factual criteria are not necessary in the instant case although the court below specifically remanded, on November 20, 1952 [20] an analogous case for the purpose of a hearing to develop such factual criteria. That action, taken later than its action in the instant case, shows an inconsistency of action that calls for an exercise in the instant case of this Court's power of supervision.

The Court below failed to pass upon a major issue, i.e., whether the Board correctly excluded evidence of the public interest. When the Board issued petitioner its Letter of Registration, it found that petitioner's operation was in the public interest. There has been no finding that the continuance of this Letter of Registration will not be in the public interest, and absent such finding by the Board, the revocation was without authority of law.

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[20] No. 11,115, U. S. Circuit Court of App. D. C., opinion November 20, 1952, as yet unpublished.

Petitioner sought to introduce evidence with respect to the public interest and the public convenience and necessity of petitioner's operations between Seattle and Alaska, but the Examiner and the Board refused to receive or consider such evidence, thereby thwarting the very public interest which supports the regulation claimed to be violated. That evidence should have been admitted, and, if it were considered, a different conclusion would probably have been reached.

Somewhere in the course of this type of litigation, evidence with respect to the propriety of the administrative ruling should be admitted and considered. See *Gibson Wine Company* v. *Snyder*, U. S. App. D. C., 194 F. 2d 329. In the cited case, the Court was divided on the issue of whether the agency or the District Judge should consider the evidence, but the Court made it clear that the evidence was proper, and a majority of the Court relied upon this type of evidence for decision. In the instant case, the agency unlawfully rejected such evidence.

The Board has declared by official action that 88.9% of the transportation performed by large irregular air carriers was assertedly performed illegally; that only .8% of the transportation performed by large irregular air carriers was transportation legally performed; but it has expressed no opinion on only 10.3% of the transportation performed by large irregular air carriers (R. 637). Only an insignificant fraction of the Large Irregular Air Carriers could exist within such regulations.

If a regulation is just and reasonable, the majority will comply and only the minority will be violators. However, the unjustness and unreasonableness of this regulation is attested to by the fact that only the amazingly low percentage of 8/10 of 1% of the carriers show operations in accordance with the regulations as determined by the Board (R. 631-637).

The analysis of the operations performed by the carriers approved as operating properly under the regulation (R. 653-660) shows that not even one of the carriers approved by the Board was dependent upon air transportation for the greater part of their revenues. This, therefore, clearly demonstrates the unjustness and unreasonableness of Regulation 291 as applied to Large Irregular Air Carriers. The small fraction of transportation performed by the carriers approved as operating properly under the regulation could be performed only because such carriers were not dependent upon air transportation to provide revenues to sustain them. The Board adopted and applied to Large Irregular Air Carriers, including petitioner, and revoked petitioner's license upon the basis of, a regulation which was in fact "unjust and unreasonable" (R. 631-637), and contrary to Section 416 of the Civil Aeronautics Act (49 U.S.C. 496).

On August 13, 1947, Chairman Landis of the Civil Aeronautics Board wrote to Senator Magnuson, as follows:

> "As you indicate, strict application of the terms of this regulation would appear to require, in the case of a tariff specifiying an infinite number of charges applicable between all conceivable combinations of points. Actually our studies indicate that carriers operating the larger transport types of aircraft (the carriers operating aircraft grossing less than 10,000 pounds each do not file tariffs) tend to confine the bulk of their operations to a relatively few points. *Such practice is not inconsistent with the concept of irregular operations set forth in section 292.1.*" (*Italics supplied.*) (Hearings before a Subcommittee of the Select Small Business Committee, U. S. Senate, 82d Congress 1st Sess., on Role of Irregular Airlines in U. S. Air Transportation Industry, Apr. 23, 24, 25, 27, 30, May 1 and 5, 1951, page 148.)

Regulations are valid only as subordinate rules and when found to be within the framework of the policy which the

legislature has sufficiently defined. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241; *Wichita R. & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 67 L. Ed. 124, 43 S. Ct. 51. It is a wholesome and necessary principle that an administrative agency must pursue the procedure and rules enjoined upon it by the statute creating it, and show a substantial compliance therewith, to give validity to its action. See *Panama Refining Co.* v. *Ryan, supra.* Administrative regulations which go beyond what the legislature has authorized have been said to be void and may be disregarded. See *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 61 L. Ed. 791, 37 S. Ct. 387; *Illinois C. R. Co.* v. *McKendree*, 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 153.

The Board held, in its formal opinion, that the regulation concerned was clear, unambiguous, and susceptible of understanding. Yet, the Board, in order to give this regulation the specificity which petitioner has challenged and the Board has denied, has found it necessary to attempt to interpret this regulation in terms of specific numbers of flights per calendar month. However, even this numerical norm has not been constant. At one time, 12 flights per calendar month, was "irregular" and "infrequent." Later it was 10 flights, and in the Opinion of May 25, 1950, it was eight flights as between some pairs of points, and only three flights as between other pairs of points. This shows that the term "regularity" and "frequency" as expressed in Sec. 291.1, falls short of the standards of clarity and precision required for rules and regulations having the force and effect of Law.

This position is firmly sustained by a long line of cases which are cited in *U. S.* v. *Cohen*, 255 U. S. 81, 89, 65 L. Ed. 516, 520. This court in that case said:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is,

whether the words, 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. * * * And again, this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

"That it results from the consideration which we have stated that the section before us was void, for repugnancy to the Constitution, is not open to question. *United States* v. *Reese*, 92 U.S. 214, 219, 220, 23 L. ed. 563, 565; * * *"

Conclusion

As the court below has decided an important question of Federal law, has decided a Federal question in a way probably in conflict with an applicable decision of this court, has misinterpreted important statutes of the United States, decided questions of substance relating to the application of the Constitution, and has not given proper effect to an applicable decision of this court, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN E. MILLER,
Attorney for Petitioner.

APPENDIX

Pertinent Statutes and Regulations

Administrative Procedure Act (5 U. S. C.):

"Sec. 1001(e). 'License' includes the whole or part of any agency permit, certificate, approval, registration, charter membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license."

"Sec. 1003(a). General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

"Sec. 1004. Adjudications

* * * * * * *

"Procedure

"(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent,

hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

"Sec. 1008. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

"In the exercise of any power or authority—

"(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

"(b) . . . Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. . . ."

CIVIL AERONAUTICS ACT OF 1938, AS AMENDED:

"Sec. 401 [52 Stat. 987, 49 U. S. C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein."

"Sec. 401(c) [52 Stat. 987, 49 U. S. C. 481] . . .

"(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any in-

terested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible."

"Terms and Conditions of Certificate

"Sec. 401(f) [52 Stat. 987, 49 U. S. C. 481] . . .

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment therto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable; and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special serv-

ice, without regard to the points named in its certificate, under regulations prescribed by the Authority."

"Sec. 401 [52 Stat. 987, 49 U. S. C. 481] . . .

(h) The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority [Board], with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate."

"Sec. 416 [52 Stat. 1004, 49 U. S. C. 496] . . .

"(a) The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest."

"Exemptions

"(b) (1) The Authority, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the require-

ments of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

"(2) The Authority shall not exempt any air carrier from any provision of subsection (1) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B) to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Authority finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraphs is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Authority to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots."

"JUDICIAL REVIEW OF AUTHORITY'S ORDERS

"Orders of Authority Subject to Review

"SEC. 1006 [52 Stat. 1024, 49 U. S. C. 646]

* * * * * * *

"Certification or Certiorari

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

REGULATIONS SERIAL NUMBER 388

ADOPTED BY THE CIVIL AERONAUTICS BOARD
AT ITS OFFICE IN WASHINGTON, D. C. ON THE 5TH DAY
OF MAY, 1947

The Civil Aeronautics Board, having held a hearing and issued its opinion in the Investigation of Non-Scheduled Air Service, Docket No. 1501, relating to non-certificated air carriers,[21] having circulated for comment a draft and thereafter a revised draft of proposed regulation relating to non-certificated air carriers, having considered written comments and oral argument thereon in Docket No. 2742, and having also considered other data and information [22] available to the Board, finds as follows:

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[21] As used herein the term "non-certificated air carriers" refers to air carriers engaging in air transportation which do not hold certificates of public convenience and necessity issued by the Board, and the term "certificated air carriers" refers to air carriers which do hold such certificates.

[22] Such data and information include, among other things, the reports heretofore filed with the Board pursuant to Section 292.1 of the Economic Regulations, data obtained in investigations made by the enforcement staff of the Board, financial Forms 41, 2380 and 2780, and other reports filed with the Board by the certificated air carriers, informal complaints filed against non-certificated air carriers, and applications for air carrier operating certificates filed with the Civil Aeronautics Administration pursuant to Part 42 of the Civil Air Regulations.

1. Since 1938 there has been in effect an exemption regulation adopted by the Board which exempts non-certificated air carriers from all provisions of Title IV of the Civil Aeronautics Act (other than sections 401(1) and 407(a), and, since June, 1946, section 411) so long as they engage only in irregular services as defined in such regulation. At the time such regulation was originally adopted the Board believed it was undesirable to provide for the detailed economic regulation of the operations of such carriers without further study. Since that time and particularly following the close of the war, the Board has accumulated information and data which indicate that the aggregate operations of such carriers have increased in scope and importance, and that operations by individual carriers are frequently extensive. Some such operations have been conducted with little regard to the responsibility and duty owed to the public by a common carrier with respect to service, and have resulted in numerous complaints to the Board concerning tariff and operating practices, including but not limited to failure of such carriers to perform the service agreed upon, great variations in the fares and rates charged by the same carrier for comparable service, failure to make refunds to passengers and shippers for transportation not performed, misrepresentation of equipment, facilities and services, and use of inadequate and makeshift equipment and facilities. Both the protection of the public from improper practices by such non-certificated air carriers and protection of the certificated carriers against unregulated competition require that additional regulatory provisions of the Civil Aeronautics Act be now made applicable to such non-certificated air carriers.

2. In addition to the public demand and need for air transportation services furnished by the certificated air carriers on regularly scheduled operations, there is public demand and need at the present time for air services on an irregular basis both to certificated and non-certificated points. Such irregular services vary greatly with respect to type of service, and fill a need which, because of fluctuations in the demand and the impossibility of determining where and when the demand will arise, by its very nature

cannot be fulfilled economically by carriers operating on regular schedules and routes. Such services can be performed by non-certificated air carriers, and because of their knowledge of local conditions or willingness to perform specialized types of services such services can frequently be performed by them more adequately, economically and quickly than by certificated carriers. To require the certification of such carriers at the present time would be impracticable because it would be necessary to issue a certificate of public convenience and necessity which would either impose no substantial limitations upon operations or which would substantially reduce the flexibility and usefulness of the operations of such carriers. Certification, in the case of many small scale operations, would be uneconomical and would tend to prevent or retard the development of new types of services designed to meet special conditions. Because of the fact that irregular services meet a different need and must be infrequent and irregular, such services, if properly regulated under provisions of the Act other than those relating to certificates of public convenience and necessity, will not under present conditions have adverse competitive effect upon the services performed by the certificated air carriers.

3. In view of the considerations mentioned in paragraphs 1 and 2 hereof, and in order to insure the flexibility in the conduct of irregular services which is implicit in exemption of non-certificated air carriers from certification, Irregular Air Carriers, as defined in Section 292.1 below, should continue to be exempted from the requirements of section 401 of the Act other than subsection (1). Protection of the public and the orderly development of the air transportation system in accordance with the objectives of section 2 of the Act, however, require that certain provisions of the Act which are not directly related to the certification provisions of the Act should be made applicable to the Irregular Air Carriers utilizing equipment of substantial size. Such carriers are now subject to sections 401(1), 407(a) and 411, and these requirements should be continued. In addition, such carriers should now be made subject to sections 403, 404(b), 407(b), 407(c), 407(d),

407(e), 409(b), 410, 415 and 416; and to the requirements of section 404(a), relating to safe service, equipment and facilities. In addition, such carriers should be made subject to the provisions of sections 408, 409(a), 412, 413 and 414, except to the extent, as more fully set forth in paragraph (c) of Section 292.1 below, that such provisions involve other Irregular Air Carriers.

4. A portion of the irregular air service now being performed is performed by small air carriers operating a limited number of planes of small size. From reports submitted to the Board it appears that non-certificated air carriers operating one or more aircraft having a gross take-off weight in excess of 10,000 pounds constituted less than 20 percent of the total number of non-certificated air carriers, but flew approximately 30 percent of the total revenue passenger miles flown by all such carriers. It would thus appear that Irregular Air Carriers operating aircraft under 10,000 pounds may be subjected to a much lesser degree of economic regulation without materially affecting the over-all air transportation system. Such operations are limited in scope, do not represent a serious threat to certificated operations, and extensive regulation thereof at this time would be unduly burdensome and costly to such carriers, would tend to increase the cost and impair the value of such services to the public, and would impose unnecessary additional administrative burden upon the Board. Accordingly, such Irregular Air Carriers should not be made subject to sections 403, 404(b), 407(b), 407(c), 408, 409(a), 410 and 412, but should be made subject to all other provisions of the Act to which the Irregular Air Carriers utilizing equipment of substantial size are subject.

In drawing the line between the Irregular Air Carriers utilizing equipment of substantial size and the Irregular Air Carriers which utilize only smaller equipment, the Board finds that the use of a single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds would involve an operation of substantial size in relation to the service offered to the public and the competitive effect upon other air carriers; and that the use of aircraft units having an allowable gross take-off weight between 6,000 and

10,000 pounds and an aggregate gross take-off weight in excess of 25,000 pounds would likewise involve a substantial operation.

5. Section 292.1 of the Economic Regulations as revised herein, unlike the exemption heretofore in effect does not provide for exemption from the Act with respect to the carriage of persons in foreign air transportation. The Board finds that notwithstanding the findings in paragraphs 2 and 3 hereof the continuation of the exemption with respect to such transportation is no longer justified in view of the recent substantial extension of our international air transportation system, as well as the recent award of foreign air carrier permits, and in view of the smaller traffic potential which the Board finds to exist in the field of international air transportation as compared with interstate and overseas air transportation.

6. As a condition to the grant of the exemptions provided for in Section 292.1 below, such section will provide for letters of registration to be issued to Irregular Air Carriers, for quarterly operation reports, and for special reports on the institution of service with large aircraft by such carriers theretofore utilizing only small aircraft. These requirements are deemed necessary in order that the Board may maintain adequate supervision and obtain information with respect to exempted operations.

7. Unless specific provision were made herein the officers and directors of Irregular Air Carriers otherwise would be subject to the interlocking relationships provisions of section 409 of the Act, even though the Irregular Air Carriers in which they hold the positions are wholly or partially exempted from such provisions by the terms of Section 292.1 below. The Board's statutory powers to grant exemptions from provisions of Title IV of the Act extend only to air carriers and not to individuals or persons other than air carriers. Certain interlocking relationships as specified in section 409 occupied by such persons are lawful only if approved by the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby. The Board has determined in this regard that since it is granting exemption to

certain Irregular Air Carriers from the requirements of section 409 with respect to certain relationships, a due showing within the meaning of the statute to justify approval of an interlocking relationship, upon application filed by an officer or director of an Irregular Air Carrier, would be made by a showing that such carrier itself had been granted an exemption from the necessity of obtaining approval. To require each such officer or director to file such an application and make such a showing, however, would appear to impose a useless administrative burden upon the Board and would not be conducive to the proper dispatch of business and to the ends of justice. The Board has determined, therefore, that such showing by all such officers and directors individually shall be presumed to have been made, and upon the basis thereof has granted blanket approval of such interlocking relationships in Section 292.1 below.

8. In view of the foregoing considerations, the present enforcement of the provisions of Title IV, except to the extent required in Section 292.1 below, would be an undue burden on Irregular Air Carriers by reason of the limited extent of, and the unusual circumstances affecting the operations of such carriers, and would not be in the public interest.

On the basis of the foregoing findings and pursuant to the Civil Aeronautics Act of 1938, as amended, particularly sections 205(a) and 416(b) thereof, and for the purpose of providing for the economic regulation of services conducted on an irregular basis by non-certificated air carriers, the Civil Aeronautics Board hereby amends Section 292.1 of the Economic Regulations in its entirety to read as follows effective June 10, 1947:

SECTION 292.1 OF THE ECONOMIC REGULATIONS IRREGULAR AIR CARRIERS

(a) *Applicability.*—This section shall not apply to any air carrier authorized by a certificate of public convenience and necessity to engage in air transportation, to Alaskan Air Carriers, to operations within Alaska, or to any non-certificated air carrier engaged in air transportation pursuant to special or individual exemption by the Board or pur-

suant to exemption created by any other section of the Economic Regulations.

(b) *Classification.*—There is hereby established a classification of non-certificated air carriers to be designated as "Irregular Air Carriers". An Irregular Air Carrier shall be defined to mean any air carrier (1) which does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, (2) which directly engages in interstate or overseas air transportation of persons and property or foreign air transportation of property only, and (3) which does not hold out to the public, expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a "point" shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place.

(c) *Exemptions.*

(1) *General.*—Except as otherwise provided in this section, Irregular Air Carriers shall be exempt from all provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, other than the following:

(i) Subsection 401(1) (Compliance with Labor Legislation);

(ii) Section 403 (Tariffs);

(iii) Subsection 404(a) (Carrier's Duty to Provide Service, etc.), only in so far as said subsection requires air carriers to provide safe service, equipment, and facilities in connection with air transportation;

(iv) Subsection 404(b) (Discrimination);

(v) Subsection 407(a) (Filing of Reports): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(a) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(vi) Subsection 407(b) (Disclosure of Stock Ownership);

(vii) Subsection 407(c) (Disclosure of Stock Ownership by Officers or Directors);

(viii) Subsection 407(d) (Form of Accounts): *Provided,* That no provision of any rule, regulation, term, condition or limitation prescribed pursuant to said subsection 407(d) shall be applicable to Irregular Air Carriers unless such rule, regulation, term, condition or limitation expressly so provides;

(ix) Subsection 407(e) (Inspection of Accounts and Property);

(x) Section 408 (Consolidation, Merger, and Acquisition of Control): *Provided,* That Irregular Air Carriers shall be exempt from section 408 in so far as said section would make it unlawful, without prior approval by the Board, (*a*) for any Irregular Air Carrier or any person controlling any such carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of another Irregular Air Carrier, (*b*) for any Irregular Air Carrier to consolidate or merge with another Irregular Air Carrier, and (*c*) for any Irregular Air Carrier or any person controlling any such air carrier to acquire control of another Irregular Air Carrier; *Provided further,* That any Irregular Air Carrier which consolidates or merges with another Irregular Air Carrier and any Irregular Air Carrier or any person controlling any such carrier that acquires control of, or purchases, leases, or contracts to operate the properties, or any substantial part thereof, of another Irregular Air Carrier pursuant to the exemption granting herein, shall submit to the Board, not more than 30 days following the consummation of the transaction, a report indicating in reasonable detail the nature and result of the transaction.

(xi) Subsection 409(a) (Interlocking relationships): *Provided,* That if an application by any Irregular Air Car-

rier for approval of an interlocking relationship in existence on the effective date of this section is filed with the Board prior to a date 30 days after the effective date of this section, such air carrier may retain the officer, director, member, or stockholder involved in such relationship pending final disposition by the Board of said application: *Provided further*, That Irregular Air Carriers shall be exempt from subsection 409(a) in so far as said subsection would make it unlawful, without prior approval by the Board, (*a*) for any Irregular Air Carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in another Irregular Air Carrier, (*b*) for any Irregular Air Carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in another Irregular Air Carrier;

(xii) Subsection 409(b) (Profit from Transfer of Securities);

(xiii) Section 410 (Loans and Financial Aid);

(xiv) Section 411 (Methods of Competition);

(xv) Section 412 (Pooling and Other Agreements): *Provided*, That Irregular Air Carriers shall be exempt from section 412 until 60 days after the effective date of this section: *Provided further*, That Irregular Air Carriers shall be exempt from section 412 in so far as said section would require any Irregular Air Carrier to file with the Board a copy or a memorandum of certain contracts or agreements (other than contracts or agreements for pooling or apportioning earnings, losses, traffic, service or flying equipment), or of modifications or cancellations thereof, between such carrier and any other Irregular Air Carrier;

(xvi) Section 413 (Form of Control);

(xvii) Section 414 (Legal Restraints);

(xviii) Section 415 (Inquiry into Air-Carrier Management);

(xix) Section 416 (Classification and Exemption of Carriers).

(2) *Additional Exemptions for Irregular Air Carriers Utilizing Small Aircraft.*—Subdivisions (ii), (iv), (vi), (vii), (x), (xi), (xiii) and (xv) of subparagraph (1) of this paragraph shall not apply to any Irregular Air Carrier which does not utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds.

(3) *Additional Temporary Exemptions in Foreign Air Transportation.*—Notwithstanding any other provisions of this section, Irregular Air Carriers for a period of three months after the effective date of this section, shall, with respect to foreign air transportation of persons, be exempt from all provisions of sections 401 (except subsection 401(1)) and 403 of the Civil Aeronautics Act of 1938, as amended, only, however, to the extent that such foreign air transportation of persons is confined to operations of the type exempted under section 292.1 prior to this revision of such section.

(4) *Approval of Certain Interlocking Relationships.*—To the extent that any officer or director of an Irregular Air Carrier would, without prior approval by the Board, be in violation of any provision of subsection 409(a) (3) of the Civil Aeronautics Act of 1938, as amended, by reason of any interlocking relationship with another Irregular Air Carrier, such relationship is hereby approved.

(5) *Effect on Other Statutes.*—The exemptions hereinabove granted from certain provisions and requirements of sections 408, 409, and 412 shall not constitute an order made under such sections, within the meaning of section 414, and shall not confer any immunity or relief from operation of the "antitrust laws," or any other statute (except the Civil Aeronautics Act of 1938, as amended), with respect to any transaction, interlocking relationship or agreement otherwise within the purview of such section.

(5) *Operational Reports by Irregular Air Carriers.*—On or before July 20, 1947, and thereafter on or before

the 20th day of every October, January, April and July, each Irregular Air Carrier, except those Irregular Air Carriers utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, shall file with the Board a quarterly operational report covering the period of the three preceding calendar months, showing all flights operated in air transportation during such period, and stating, with respect to each such flight, the dates of departures and arrivals and the origin, destination and intermediate points served. Whenever any Irregular Air Carrier theretofore utilizing only small aircraft, as specified in subparagraph (2) of this paragraph, undertakes to utilize in its air transportation services any single aircraft unit having an allowable gross take-off weight in excess of 10,000 pounds, or three or more aircraft units (not including any aircraft unit having an allowable gross take-off weight of less than 6,000 pounds) having an aggregate allowable gross take-off weight in excess of 25,000 pounds, such Irregular Air Carrier shall notify the Board in writing within not more than ten days after the actual commencement of such utilization.

(d) *Registration for Exemption.*

(1) *Letter of Registration Required.*—From and after 60 days after the effective date of this section no Irregular Air Carrier may engage in any form of air transportation unless there is then outstanding and in effect with respect to such air carrier a Letter of Registration issued by the Board: *Provided*, That if any Irregular Air Carrier, otherwise authorized to engage in air transportation pursuant to this section, shall file with the Board within 60 days after the effective date of this section, an application for a Letter of Registration, such applicant may engage in such air transportation until such Letter has been issued, or such applicant has been notified that it appears to the Board that such applicant is not entitled to the issuance of such Letter.

(2) *Issuance of Letter of Registration.*—Upon the filing of proper application therefor, the Board shall issue, to any Irregular Air Carrier, a Letter of Registration which,

unless otherwise sooner rendered ineffective, shall expire and be of no further force and effect, upon a finding by the Board that enforcement of the provisions of section 401 (from which exemption is provided in this section) would be in the public interest and would no longer be an undue burden on such Irregular Air Carrier or Class of Irregular Air Carriers. Such application shall be certified to by a responsible official of such carrier as being correct, and shall contain the following information: (i) date; (ii) name of carrier; (iii) mailing address; (iv) location of principal operating base; (v) if a corporation, the place of incorporation, the name and citizenship of officers and directors and a statement that at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions; (vi) if an individual or partnership, the name and citizenship of owners or partners; (vii) the types and numbers of each type of aircraft utilized in air transportation. Such application shall be submitted in duplicate in letter form or on C.A.B. Form No. 2789 which is available on request for the convenience of applicants.

(3) *Non-transferability of Letter of Registration.*—A Letter of Registration shall be nontransferable and shall be effective only with respect to the person named therein.

(4) *Suspension of Letter of Registration.*—Letters of Registration shall be subject to immediate suspension when, in the opinion of the Board, such action is required in the public interest.

(5) *Revocation of Letter of Registration.*—Letters of Registration shall be subject to revocation, after notice and hearing, for knowing and willful violation of any provision of the Civil Aeronautics Act of 1938, as amended, or of any order, rule or regulation issued under any such provision, or of any term, condition or limitation of any authority issued under said Act or regulations.

(e) *Separability.*—If any provision of this section or the application thereof to any air transportation, person, class of persons, or circumstance is held invalid, the remainder of the section and the application of such provisions to other air transportation, persons, classes of

persons, or circumstances shall not be affected thereby. (52 Stat. 984 and 1004, as amended; 49 U. S. C. 425a and 496b).

Note: The record-keeping and reporting requirements of this section have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

By the Civil Aeronautics Board:

(S.) M. C. MULLIGAN,
Secretary.

(SEAL.)

Regulations
Serial Number ER-136

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington 25, D. C.

Economic Regulations
Interpretation No. 1 to §292.1
Adopted: December 10, 1948

IRREGULAR AIR CARRIERS

The following interpretation of the Economic Regulations §292.1, in the form of illustrative examples of "irregular" air transportation as therein defined, is being promulgated pursuant to section 205(a) of the Civil Aeronautics Act and Sec. 3(a) of the Administrative Procedure Act. It is adopted as part of the regulations. Its purpose is to assist irregular air carriers to conduct their operations in conformity with the Act and §292.1 of the Economic Regulations.

In consideration of the foregoing, the Civil Aeronautics Board hereby issues the following interpretation of §292.1:

Examples of Irregular Air Transportation within the Meaning of Section 292.1

For the guidance of Irregular Air Carriers and other interested parties the Board here sets forth a number of

illustrative examples of irregular and regular service. All Irregular Air Carriers should study these examples, for the Board expects to use them as standards to apply to the operations of such Carriers.

It should be noted that all of the illustrations included here refer only to actual operations. Such operations indicate a course of conduct constituting the holding out of regular or irregular service, as the case may be. The holding out of regular service may also be brought about by means other than actual operations—for example, although its services are operated irregularly, a carrier may be holding out regular service by reason of the nature and extent of its advertising and traffic solicitation efforts. In other words, an Irregular Air Carrier is not immune from enforcement action if its actual *operations* are irregular but all the circumstances surrounding its business show that the carrier is *holding out* regular service.

The illustrations included represent application of the principles announced in *Page Airways, Inc., Investigation*, 6 C.A.B. 1061, *Trans-Marine Airways, Inc., Investigation of Activities*, 6 C.A.B. 1071, and *Investigation of Non Scheduled Services*, 6 C.A.B. 1049, and more particularly of the cease and desist order entered in the *Matter of the Noncertificated Operations of Trans Caribbean Air Cargo Lines, Inc.*, Order Serial No. E-370, adopted March 14, 1947. This is emphasized because the Board is not attempting by revision of section 292.1 either to enlarge or contract the scope of operations permitted by the regulation.

(1) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

S	M	T	W	T	F	S
(1)	2	3	4	5	6	7
(8)	9	10	11	12	13	14
(15)	16	17	18	19	20	21
(22)	23	24	25	26	27	28
(29)	30	31				

Since these flights are conducted on the same day of each week, the service is not irregular within the meaning of

the regulation. Moreover, if over a period of weeks an occasional Sunday flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(2) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	1	(2)	3	(4)	5	6
7	8	(9)	10	(11)	12	13
14	15	(16)	17	(18)	19	20
21	22	(23)	24	(25)	26	27
28	29	(30)				

These flights are conducted regularly, twice a week, without frequent and extended definite breaks in service and are obviously not irregular within the meaning of the regulation. Moreover, if over a period of weeks an occasional flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(3) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	—	—	(1)	2	3	4
5	6	(7)	8	9	10	11
12	(13)	14	15	16	17	(18)
19	20	21	(22)	23	24	25
(26)	27	28	29	(30)		

These flights are conducted at regularly recurring periods, or substantially regular periods (every 4, 5 or 6 days), and therefore do not achieve infrequency and irregularity of service through frequent and extended definite breaks in service. Such service is not irregular within the meaning of the regulation.

(4) An Irregular Air Carrier operates between points A

and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	—	—	—	—	1	2
3	4	(5)	6	(7)	8	9
10	(11)	(12)	13	14	15	16
17	18	(19)	(20)	21	22	23
24	(25)	26	(27)	28	29	30
31						

—	1	(2)	3	(4)	5	6
7	8	9	(10)	11	12	(13)
14	15	16	17	18	19	20
21	(22)	23	24	(25)	26	27
(28)	29	30	(31)			

These flights are conducted twice a week in succeeding weeks without the intervention of other weeks or similar periods at irregular but frequent intervals during which no flights are operated. Such service is not irregular within the meaning of the regulation.

(5) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	—	—	—	—	(1)	2
(3)	(4)	5	(6)	7	(8)	9
10	11	(12)	(13)	14	15	16
17	(18)	19	(20)	21	(22)	23
24	25	26	27	28	29	30
(31)						

S	M	T	W	T	F	S
—	(1)	2	(3)	4	5	(6)
7	8	(9)	(10)	11	12	13
(14)	15	(16)	17	(18)	(19)	20
21	22	23	24	25	26	27
(28)	(29)	30				

In this pattern, unlike the preceding example, two breaks of at least a week occur within a two-month period. However, operations in the other weeks occur with such frequency that the breaks in service are not of sufficient fre-

quency and extent to compensate for the substantial number of flights conducted with frequency over a substantial period. The flights are not irregular within the meaning of the regulation.

(6) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	—	—	1	2	(3)	4
5	6	(7)	8	9	(10)	11
12	13	14	15	16	17	18
19	20	(21)	22	23	(24)	25
26	27	(28)	(29)	30	31	
—	—	—	—	—	—	1
2	3	(4)	5	6	(7)	8
9	10	11	12	13	14	(15)
16	17	(18)	19	20	(21)	22
23	24	(25)	26	27	(28)	29
30	31					

The flights do not exceed two per week and the two-month period includes two definite breaks in service. However, in view of the frequent rendition of service on Tuesdays and Fridays the breaks in service and comparatively small number of flights operated are not sufficient to destroy the pattern of regularity. The service is not irregular within the meaning of the regulation.

(7) An Irregular Air Carrier operates between points A and B in one direction, on the days of the two successive months which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	1	(2)	3	(4)	5	(6)
7	(8)	9	(10)	11	(12)	13
14	15	16	17	18	19	(20)
21	(22)	23	(24)	25	(26)	27
(28)	29	(30)	31			
—	—	—	—	(1)	2	(3)
4	5	6	7	8	9	10
(11)	12	(13)	14	(15)	16	(17)
18	(19)	20	(21)	22	(23)	24
25	26	27	28	29	30	(31)

These flights are operated every other day except for infrequent breaks. Such service is not irregular within the meaning of the regulation.

(8) Four Large Irregular Air Carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in examples (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B.

(9) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the month which are encircled on the following calendar table:

S	M	T	W	T	F	S
—	—	(1)	2	3	4	5
6	7	8	(9)	10	11	12
13	14	15	16	(17)	18	19
20	21	22	23	24	25	(26)
27	(28)	29	30	31		

These flights are conducted on a different day of each week, and are operated only after frequent and definite breaks in service. Although two flights (on the 26th and 28th) were operated within one period of less than one week, this frequency was compensated for by the breaks of at least a week between the other flights. The flights are therefore irregular within the meaning of the regulation.

(10) An Irregular Air Carrier operates between points A and B, in one direction, on the days of the two successive months which are encircled on the following calendar table (numerals above and to the right of encircled dates indicate the number of flights operated on those dates):

S	M	T	W	T	F	S
—	1	2	3	4	5	6
7	8	(9)	(10)	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
(28)	29	30				
—	—	—	1	2	3	4
(5)	(6) [2]	(7) [3]	(8) [2]	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	(29)	(30) [2]	31	

These flights are conducted in such manner that frequent, extended and definite breaks in service occur at irregular intervals and therefore the service is irregular within the meaning of the regulation.

By the Civil Aeronautics Board:

(S.) M. C. Mulligan,
Secretary.

[SEAL]

Civil Aeronautics Board, Economic Regulations, July 1, 1949

(Amended by ER-151 and ER-154)

Part 291—Classification and Exemption of Irregular Air Carriers

Note: The following interpretation of Part 291 was adopted by Regulation Serial No. ER-136, 13 F. R. 7769.

Examples of irregular air transportation within the meaning of Part 291. For the guidance of irregular air carriers and other interested parties the Board here sets forth a number of illustrative examples of irregular and regular service. All irregular air carriers should study these examples, for the Board expects to use them as standards to apply to the operations of such carriers.

It should be noted that all of the illustrations included here refer only to actual operations. Such operations indicate a course of conduct constituting the holding out of regular or irregular service, as the case may be. The holding out of regular service may also be brought about by means

other than actual operations—for example, although its services are operated irregularly, a carrier may be holding out regular service by reason of the nature and extent of its advertising and traffic solicitation efforts. In other words, an irregular air carrier is not immune from enforcement action if its actual operations are irregular but all the circumstances surrounding its business show that the carrier is holding out regular service.

The illustrations included represent application of the principles announced in *Page Airways, Inc., Investigation*, 6 CAB 1061, *Trans-Marine Airways, Inc., Investigation of Activities*, 6 CAB 1071, and *Investigation of Nonscheduled Services*, 6 CAB 1049, and more particularly of the cease and desist order entered in the *Matter of the Noncertificated Operations of Trans Caribbean Air Cargo Lines, Inc.*, Order Serial No. E-370, adopted March 14, 1947. This is emphasized because the Board is not attempting by revision of Part 291 either to enlarge or contract the scope of operations permitted by the regulation.

(1) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
[1]	2	3	4	5	6	7
[8]	9	10	11	12	13	14
[15]	16	17	18	19	20	21
[22]	23	24	25	26	27	28
[29]	30	31				

Since these flights are conducted on the same day of each week, the service is not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional Sunday flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(2) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	1	[2]	3	[4]	5	6
7	8	[9]	10	[11]	12	13
14	15	[16]	17	[18]	19	20
21	22	[23]	24	[25]	26	27
28	29	[30]				

These flights are conducted regularly, twice a week, without frequent and extended definite breaks in service and are obviously not irregular within the meaning of Part 291. Moreover, if over a period of weeks an occasional flight is omitted, or is operated on some other day of the week, such minor variations in the general pattern of regularity would not cause the service to become an irregular service.

(3) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	—	—	[1]	2	3	4
5	6	[7]	8	9	10	11
12	[13]	14	15	16	17	[18]
19	20	21	[22]	23	24	25
[26]	27	28	29	[30]		

These flights are conducted at regularly recurring periods, or substantially regular periods (every 4, 5 or 6 days), and therefore do not achieve infrequency and irregularity of service through frequent and extended definite breaks in service. Such service is not irregular within the meaning of Part 291.

(4) An irregular air carrier operates between points A and B in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	—	—	—	—	[1]	2
3	4	[5]	6	[7]	8	9
10	[11]	[12]	13	14	15	16
17	18	[19]	[20]	21	22	23
24	[25]	26	[27]	28	29	30
31						
—	1	[2]	3	[4]	5	6
7	8	9	[10]	11	12	[13]
14	15	16	17	18	19	20
21	[22]	23	24	[25]	26	27
[28]	29	30	[31]			

These flights are conducted twice a week in succeeding weeks without the intervention of other weeks or similar periods at irregular but frequent intervals during which no flights are operated. Such service is not irregular within the meaning of Part 291.

(5) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	—	—	—	—	[1]	2
[3]	[4]	5	[6]	7	[8]	9
10	11	[12]	[13]	14	15	16
17	[18]	19	[20]	21	[22]	23
24	25	26	27	28	29	30
[31]						
—	[1]	2	[3]	4	5	[6]
7	8	[9]	[10]	11	12	13
[14]	15	[16]	17	[18]	[19]	20
21	22	23	24	25	26	27
[28]	[29]	30				

In this pattern, unlike the preceding example, two breaks of at least a week occur within a 2-month period. However, operations in the other weeks occur with such frequency that the breaks in service are not of sufficient frequency and extent to compensate for the substantial number of flights conducted with frequency over a substantial period. The flights are not irregular within the meaning of Part 291.

(6) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	—	—	1	2	[3]	4
5	6	[7]	8	9	[10]	11
12	13	14	15	16	17	18
19	20	[21]	22	23	[24]	25
26	27	[28]	[29]	30	31	
—	—	—	—	—	—	1
2	3	[4]	5	6	[7]	8
9	10	11	12	13	14	[15]
16	17	[18]	19	20	[21]	22
23	24	[25]	26	27	[28]	29
30	31					

The flights do not exceed two per week and the 2-month period includes two definite breaks in service. However, in view of the frequent rendition of service on Tuesdays and Fridays the breaks in service and comparatively small number of flights operated are not sufficient to destroy the pattern of regularity. The service is not irregular within the meaning of Part 291.

(7) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	1	[2]	3	[4]	5	[6]
7	[8]	9	[10]	11	[12]	13
14	15	16	17	18	19	[20]
21	[22]	23	[24]	25	[26]	27
[28]	29	[30]	31			
—	—	—	—	[1]	2	[3]
4	5	6	7	8	9	10
[11]	12	[13]	14	[15]	16	[17]
18	[19]	20	[21]	22	[23]	24
25	26	27	28	29	30	[31]

These flights are operated every other day except for infrequent breaks. Such service is not irregular within the meaning of Part 291.

(8) Four large irregular air carriers agree to utilize the services of a single ticket agency, XYZ Ticket Agency, Inc., with respect to service between points A and B, and to furnish to the agent the dates upon which each will operate between A and B. If the flights, considered in combination, of such carriers between A and B reveal a pattern of operations similar to those shown in examples (1) through (7) above, the combination of flights constitute regular air transportation and each such carrier is deemed to be conducting regular operations between A and B.

(9) An irregular air carrier operates between points A and B, in one direction, on the days of the month which appear in brackets on the following calendar table:

S	M	T	W	T	F	S
—	—	[1]	2	3	4	5
6	7	8	[9]	10	11	12
13	14	15	16	[17]	18	19
20	21	22	23	24	25	[26]
27	[28]	29	30	31		

These flights are conducted on a different day of each week, and are operated only after frequent and definite breaks in service. Although two flights (on the 26th and 28) were operated within one period of less than one week, this frequency was compensated for by the breaks of at least a week between the other flights. The flights are therefore irregular within the meaning of Part 291.

(10) An irregular air carrier operates between points A and B, in one direction, on the days of the two successive months which appear in brackets on the following calendar table (numerals above and to the left of dates appearing in brackets indicate the number of flights operated on those dates):

S	M	T	W	T	F	S
—	1	2	3	4	5	6
7	8	[9]	[10]	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
[28]	29	30				
—	—	—	1	2	3	4
[5]	[2 6]	[3 7]	[2 8]	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	[29]	[2 30]	31	

These flights are conducted in such manner that frequent, extended and definite breaks in service occur at irregular intervals and therefore the service is irregular within the meaning of Part 291.

§ 291.1. *Definitions*—(a) *Irregular air carrier.* The term irregular air carrier means any air carrier which (1) directly engages in air transportation, (2) does not hold a certificate of public convenience and necessity under section 401 of the Civil Aeronautics Act of 1938, as amended, and (3) does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points, or within a designated point, regularly or with a reasonable degree of regularity, upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an irregular air carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points.

(b) *Point.* The term "point" as used in this part shall mean any airport or place where aircraft may be landed or taken off, including the area within a 25-mile radius of such airport or place.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 465

AIR TRANSPORT ASSOCIATES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 1100) is reported at 199 F. 2d 181. The orders and findings of the Civil Aeronautics Board (R. 15, 32) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1952 (R. 1110), and a petition

for rehearing was denied by that Court on October 3, 1952 (R. 1143). The petition for a writ of certiorari was filed on November 25, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Petitioner operates as an air carrier by virtue of registration with the Civil Aeronautics Board under a regulation of the Board exempting irregular air carriers from the certificate requirements of the Civil Aeronautics Act. The Board has revoked petitioner's Letter of Registration, and the exemption evidenced thereby, upon findings that it has knowingly and willfully violated the Civil Aeronautics Act.

The questions presented are:

1. Whether, as petitioner claims, the Board judged the permissible character of petitioner's activities in the light of standards other than those which existed when petitioner received its Letter of Registration and began its operations.

2. Whether the Board's findings are supported by the record.

3. Whether there was a failure to meet the requirements of Section 9(b) of the Administrative Procedure Act.

4. Whether, in revoking an exemption from the certificate requirements of the Civil Aeronautics Act, the Board is required to follow the statutory procedures applicable to the revocation of a certificate of public convenience and necessity.

5. Whether the Board was required to receive

and consider evidence designed to show that petitioner's operations, although unlawful under the Board's regulations, were nonetheless serving a public need.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Aeronautics Act and the Administrative Procedure Act are set forth in the Appendix, *infra*, pp. 15 to 18. Applicable regulations of the Civil Aeronautics Board appear in the appendix to the petition for writ of certiorari (pp. 35-59) and at R. 57-63, 345-370.

STATEMENT

Petitioner is a Large Irregular Carrier, *i.e.*, an irregular carrier providing air transportation by means of large transport-type planes.[1] It does not have a certificate of public convenience and necessity, but has been operating, since it came into existence in 1948, pursuant to a regulation, issued under authority of Section 416 of the Civil Aeronautics Act, providing an exemption for persons engaged in "irregular" operations. Petitioner has a Letter of Registration, issued under this regulation on August 13, 1948, which evidences the fact that it availed itself of the exemption privilege.

---

[1] Large Irregular Carriers are permitted to conduct cargo and passenger operations between any points within the United States or within United States territory except Alaska, and between any point in the United States and any point in United States territory including Alaska. Cargo operations are permitted between any points in the world, except between points within Alaska (R. 358). Owing to conditions peculiar to Alaska, operations wholly within the Territory are governed by special regulations (see R. 358).

The regulation in force when petitioner became a carrier [2] defined an Irregular Air Carrier as one which "does not operate, or hold out to the public expressly or by course of conduct that it operates, one or more aircraft between designated points . . . regularly or with a reasonable degree of regularity . . . (14 C.F.R. 292.1(b); R. 358). It stated further (*id.*):

> No air carrier shall be deemed to be an Irregular Air Carrier unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between . . . such designated points.

It also appears that, when petitioner was issued its Letter of Registration, it was advised by a letter of transmittal that the "establishment of frequent service over regular routes" was not authorized

[2] On May 20, 1949, the Board issued a revision of the exemption regulation (14 C.F.R. (1951 Supp.) 291) terminating, as of June 20, 1949, the blanket exemption theretofore granted to large irregular carriers. The revised regulation provided, however, that any such carrier filing an application for individual exemption prior to June 20, 1949, might continue to operate as before until the Board had passed upon its application for exemption, or until its Letter of Registration was revoked or cancelled, "whichever shall be earlier" (14 C.F.R. (1951 Supp.) 291.16). No change was made by this revision in the definition of an irregular air carrier, nor was the scope of operating authority altered in any way. Petitioner made a timely application for individual exemption authority, so that it is authorized to operate to the same extent as authorized by its original exemption until the orders now under review revoking petitioner's Letter of Registration take effect. Its application, along with numerous others, is being heard in a consolidated proceeding before the Board known as *The Investigation of Air Services By Large Irregular Carriers and Irregular Transport Carriers*, Board Docket No. 5132 (R. 51).

(R. 344, 345). Petitioner was also furnished, at the same time, a copy of the underlying regulation and an explanatory statement, prepared by the Board, setting forth the principles by which the carrier should be guided in keeping its operations within the limits of the exemption (R. 345 *et seq.*).

As an additional guide to the industry, the Board issued an interpretative regulation on December 10, 1948. This interpretation sets out specific examples showing what kinds of operation between two given points are permissible and what kinds improper. The interpretation states that it does not "enlarge or contract the scope of operations permitted by the regulation." (R. 57, 58.)

From its inception as a carrier, petitioner chose to concentrate its operations between two points, Anchorage, Alaska and Seattle, Washington. By a series of letters issued in 1949 (R. 371, 389, 400), the Chief of the Board's Office of Enforcement advised petitioner that its operations and its public representations concerning its operations between Anchorage and Seattle were not permissible and that enforcement proceedings would be recommended if violations did not cease (pp. 375, 395, 396, 404). In December 1949, the Board issued an order directing petitioner to show cause why its Letter of Registration should not be revoked for knowing and willful violations of the Act and regulations issued thereunder (R. 71). The matter was assigned for hearing before an examiner and full adjudicatory proceedings followed (R. 1104). Finding that petitioner had held itself out as pro-

viding a regular service between Anchorage and Seattle, and that petitioner had in fact performed a regular operation between those points, the Board concluded that petitioner had engaged in knowing and willful violations (R. 19, 21, 38, 39, 40). It held that its determination was being made solely on the basis of requirements and standards which had been continuously in effect since petitioner received its Letter of Registration (R. 35-37).

Reviewing the administrative proceedings, the Court of Appeals held that "the record is clear that [petitioner] held out a regular Seattle service . . . a clear violation of the Regulation with reference to holding out" (R. 1107; see also 1109). Examining the "detailed findings as to the extent of operations" actually conducted, the court likewise held that the Board had ample support for its conclusion that petitioner had in fact engaged in excessive operations, in knowing and willful violation of law (R. 1107-8).

Commenting on the contention that the Board had applied standards differing from those which were in effect when petitioner first received its Letter, the court stated (R. 1108):

> . . . Associates' arguments in this respect are directed primarily to the point that the Board in fact amended its Regulation by case-by-case "interpretation," by Interpretation No. 1 of December 10, 1948, and by adoption of the 1949 Regulation repealing the blanket exemption, after Associates had made its business investments. The contention is without merit, as in-

dicated by a review of the information which Associates had when it applied for and received its Letter, as we have described hereinabove.

As to the 1949 Regulation, while it did terminate all former blanket exemptions, Associates' operating authority was extended when it filed its application for individual exemption. Moreover, the 1949 Regulation did not establish new criteria for determining whether flights are irregular and infrequent. And, again, the finding of the Board was that Associates' activities were in violation of the standards existing at the time its Letter was issued.

Dealing with petitioner's contention (see Pet. p. 9) that the Board erred in failing to follow the revocation procedures set out in Section 9(b) of the Administrative Procedure Act and Section 401(h) of the Civil Aeronautics Act, the court held (1) that Section 9(b) is in terms inapplicable because the petitioner was charged with *willful* violations, and (2) that the procedures of Section 401(h) apply only to revocations of certificate authority (R. 1109).

The court's opinion did not comment upon petitioner's contention that the Board should have received and considered evidence as to whether petitioner's activities were responsive to a public need. The court denied (R. 1143) the petition for rehearing (R. 1111) which was addressed to that issue.

ARGUMENT

1. The regulation which was in effect when petitioner obtained its Letter of Registration plainly precluded irregular carriers from offering or providing service between designated points on a regular or reasonably regular basis. By way of further definition, it stated that the service offered or provided must be "of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation . . ."[3] See, *supra*, p. 4.

Petitioner was charged with willful violation of that regulation (R. 71). Its answer to the Order to Show Cause plainly recognized that the issue presented was whether petitioner "held out and is holding out to the public expressly and by course of conduct that it operates aircraft frequently or regularly or with a reasonable degree of regularity between the point Anchorage, Alaska and the point Seattle, Washington" (R. 73). The issue of viola-

[3] The problem of drawing a restraining line for the irregular carrier was not a pressing one prior to World War II, because the early carriers flying under exemption were engaged largely in specialized activities such as aerial photography, flight instruction, crop-dusting, plane servicing, and the like. See *Investigation of Nonscheduled Air Services*, 6 C.A.B. 1049, 1051 (1946). The limited transportation services provided by these carriers were generally furnished in the same small aircraft used for their other aeronautical activities and consisted of sporadic "air-taxi" and "charter" flights.

After World War II, the irregulars began to employ large transport-type aircraft on an increasing scale. The criteria reflected in the 1947 regulations were actually evolved prior to adoption of that regulation. See *Investigation of Nonscheduled Air Services*, *supra*, at 1053, 1055; also, the Board's cease and desist order issued in *Matter of the Non-Certificated Operations of the Caribbean Air Cargo Lines, Inc.*, C.A.B. Docket No. 2593, Order Serial No. E-370 (March 14, 1947).

tion has been resolved against petitioner on the basis of evidence and findings which have been held by the Court of Appeals to provide full support.[4] Clearly, this evidentiary issue presents no occasion for exercise of this Court's certiorari jurisdiction.[5]

Petitioner has sought to raise certain questions which are not in fact presented by the case. In its questions 1-3 (Pet., pp. 3-4), it assumes that the Board determined violation by applying standards which were not in effect when petitioner obtained its Letter of Registration. As the Court of Appeals pointed out (R. 1108), petitioner argues as if the 1948 interpretation of the regulation and the 1949 revision put a new standard or test into effect. The 1948 regulation, however, did not alter or contract the privileges of the exempt carrier. It aimed simply at providing guidance to the industry. The 1949 regulation, while it has had the effect of requiring petitioner to file a new application for exemption, "did not establish new criteria for deter-

[4] Petitioner states (Pet., p. 10) that the Court of Appeals erred in "affirming the Board's holding that flights to Paine Field [at Everett, Washington] and Boeing Field [at Seattle], which are 26 miles apart, were flights to the same point." The court actually held that the practice of providing service to Seattle through the use of Paine Field constituted a holding out of service to Seattle (R. 1107). Furthermore, the decisions of the Court of Appeals and of the Board rested on operations and activities other than those relating to flights to and from Paine Field (*ibid.*).

[5] Petitioner has not presented here its contention, advanced below, that the Board's standard of regularity is void for vagueness. The Court of Appeals for the Second Circuit, as well as the court below (R. 1105-6), has held the standard to be legally enforceable. *Civil Aeronautics Board* v. *Modern Air Transport*, 179 F. 2d 622 (C.A. 2).

mining whether flights are irregular and infrequent" (*ibid.*). The Board and the Court of Appeals determined the issue of violation solely on the basis of requirements which have been continuously in effect during the entire period of petitioner's operations. There was accordingly no occasion for the Board or the Court of Appeals to reach the abstract question—What procedures would the Board be required to follow preliminary to adopting new standards for the governance of irregular carriers? There is likewise no basis for this Court to reach that question in this case.

2. Petitioner claims that the following steps must precede institution of proceedings to revoke a Letter of Registration: (1) issuance of a formal notice of violation by the Board itself (as distinct from the Board's Office of Enforcement); (2) a hearing on the charge of violation culminating in a cease and desist order; (3) an opportunity to achieve compliance. It rests these contentions on Section 9(b) of the Administrative Procedure Act and Section 401(h) of the Civil Aeronautics Act.

Section 9(b) contains the provision that before a license shall be revoked, the licensee shall be given warning and accorded an opportunity to achieve compliance. The sentence containing this provision, however, begins with the words, "Except in cases of willfulness . . ." (see *infra*, p. 15). Since the violation here was charged and found to be willful, this provision of Section 9(b) has no application.

The Court of Appeals did not hold, as petitioner

states (Pet., p. 9), that the letters from the Board's Office of Enforcement, prior to the institution of the revocation proceedings, constituted adequate warning from the agency within the meaning of Section 9(b). It held simply that Section 9(b) was inapplicable (R. 1109).[6]

Section 401(h) of the Civil Aeronautics Act similarly provides that, in order to revoke a certificate of public convenience and necessity, the Board must first determine that there has been a violation of law and then command the certificate holder to bring itself into compliance. Only if there is a failure to obey within a reasonable time thereafter may the certificate be taken up.

Petitioner argues that the above procedure should have been followed in the instant case. The short answer is that petitioner is not a certificate holder. Plainly, an exemption from the requirement that a certificate be obtained is not the equivalent of a certificate. To acquire a certificate, an applicant must demonstrate that the services which it proposes to render are required by the public convenience and necessity, and that it is fit, willing and able to furnish them. Sec. 401(d). Once a certificate is obtained, the holder is required to render adequate service and to discharge all of the other responsibilities incident to the conduct of public service enterprises. Letters of Registration, on the other hand, were issued upon the filing of a

[6] The court correctly regarded the letters and the replies thereto as relevant to the factual issue of willfulness. See R. 1109-1110. As to the element of willfulness, see also R. 285, 290-291; cf. R. 236.

pro forma application (R. 365), without any requirement of a showing of public convenience and necessity or of operating ability. The holders of such Letters are under no duty to render adequate service or, for that matter, any service at all. In granting a special degree of protection to the certificate holder, Congress gave recognition to the fact that the certificated carrier has special responsibilities. The Court of Appeals was plainly correct in holding that Section 401(h) does not cover irregular carriers operating by virtue of an exemption from the certificate provisions.[7]

An analogous question was recently presented to this Court in *Kornfeind* v. *United States,* No. 321, this Term. In that case, the holder of a motor carrier certificate had leased its rights pursuant to authorization by the Interstate Commerce Commission. The lessor subsequently brought a proceeding before the Commission to terminate the lease on the ground that the lessee had violated a provision of the Commission's transfer rules and a paragraph of the lease incorporating that provision. Finding the violation, the Commission terminated the lessee's rights. The lessee thereupon sued to set aside the Commission order on the ground, *inter alia,* that Section 212(a) of the Interstate Commerce Act (the section relating to revocation of certificates of public convenience and

[7] To like effect, see the court's earlier holding in *Standard Air Lines* v. *Civil Aeronautics Board,* 177 F. 2d 18 (C.A.D.C.). The suggestion (see Pet., p. 21) that the Board has generally issued cease and desist orders prior to instituting proceedings to revoke exemption authority is erroneous (R. 40, fn.).

necessity) entitled him to an opportunity to correct the deficiency. The Commission urged that the statutory procedures relating to revocation of a certificate are not applicable to termination of a lease of a certificate. A three-judge district court upheld the Commission's order (N.D. Ill., Civ. No. 50 C 383, May 26, 1952) and this Court affirmed the judgment *per curiam* (73 S. Ct. 104, Oct. 27, 1952).

3. Petitioner urges (Pet., pp. 15-20) that the Board should have received and considered evidence as to whether petitioner's operations were responsive to a public need. It also takes the view that it was entitled to show that there are good reasons for formulating and applying special standards to operations from and to Alaska. The thrust of the argument is that petitioner's evidence on these points might have warranted the Board in concluding that petitioner's activities should be sanctioned.

The Board's regulation plainly applies to all operations by irregular carriers, including operations between Anchorage and Seattle (R. 393-5). Petitioner is arguing, in effect, that in a proceeding to determine whether there has been a willful violation of an existing valid regulation, the party charged with the prohibited conduct is entitled to put in a case designed to show that the regulation was unwise as a matter of policy. It is submitted that the contention is plainly without merit, as shown by the action of the court below in denying the petition for rehearing based on that ground.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no substantial question warranting review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER J. CUMMINGS, JR.,
Solicitor General.

EMORY T. NUNNELEY, JR.,
General Counsel,

JOHN H. WANNER,
Associate General Counsel,

O. D. OZMENT,
Attorney,
Civil Aeronautics Board.

JANUARY, 1953.

APPENDIX

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001 *et seq.*) are:

SANCTIONS AND POWERS

Sec. 9——

(b) LICENSES.— * * * Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. * * *

The relevant provisions of the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, 49 U.S.C. 401 *et seq.*) are:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * *

* * * * *

Issuance of Certificate

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder.

* * * * *

Authority to Modify, Suspend, or Revoke

(h) The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of

such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority [Board], with an order of the Authority [Board] commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority [Board] to have been violated. Any interested person may file with the Authority [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS

Classification

SEC. 416. (a) The Authority [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the Authority [Board] finds necessary in the public interest.

Exemptions

(b)(1) The Authority [Board], from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any

provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

* * * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 465

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

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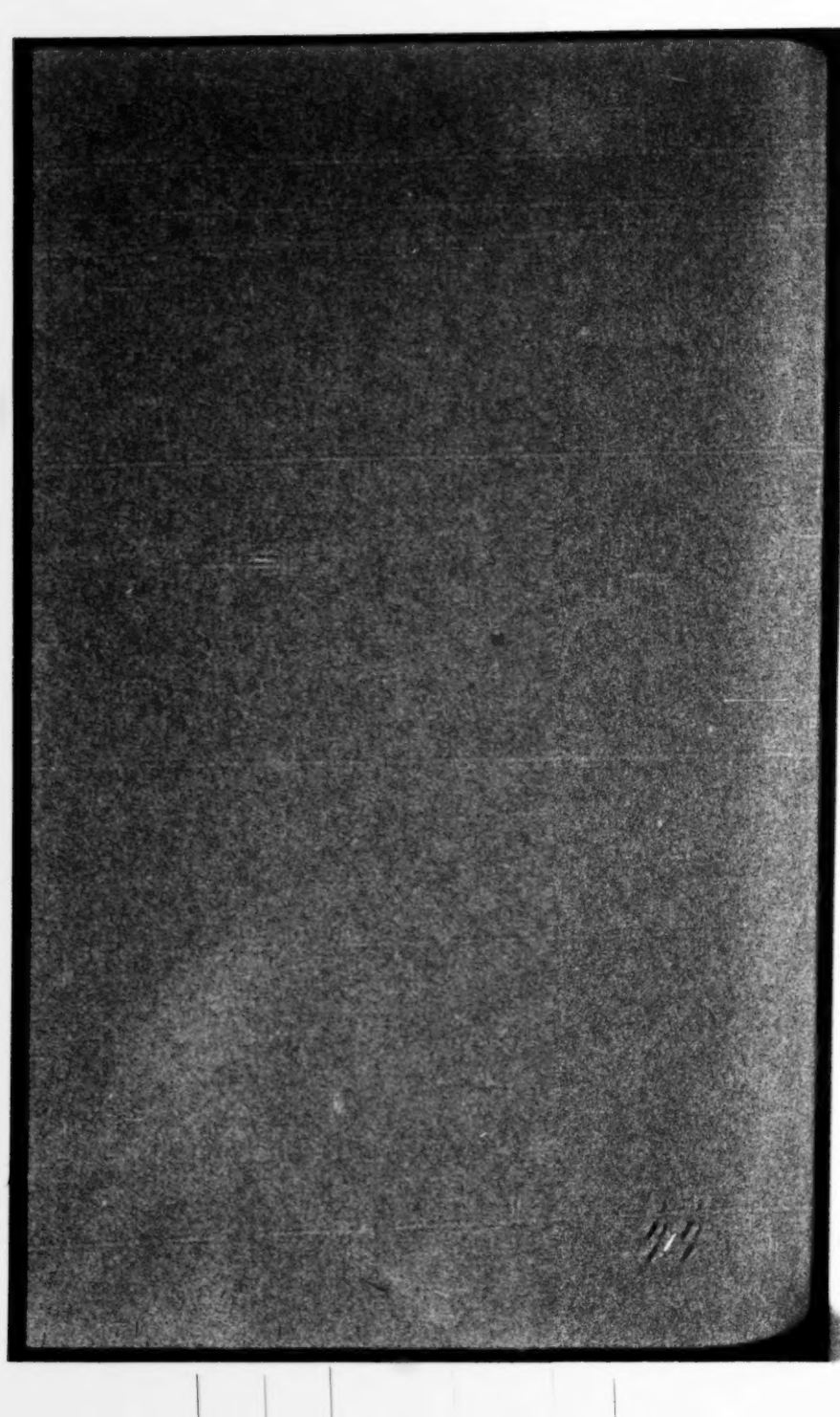
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

WARREN E. MILLER,
Counsel for Petitioner,
910 17th St., N. W.,
Washington 6, D. C.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

Respondent, in its Brief in Opposition (p. 9), erroneously charges petitioner with seeking to raise questions which were not presented in this case, and states that questions 1-3 (Pet. pp. 3-4) *assume* that the Board determined petitioner violated regulations by applying standards not in effect when petitioner obtained its Letter of Registration. This erroneous charge is refuted by the record. The revocation orders of the Civil Aeronautics Board, Serial Nos. E-5723 (J. A. 27), E-5789 (J. A. 30) and E-5877 (J. A. 32-47)

as amended by Order Serial No. E-5892 (J. A. 49) were based upon Part 291 of the Economic Regulations of the Civil Aeronautics Board, as specifically shown in said orders.

Prior to December 10, 1948, the regulation under which Petitioner was operating did not restrict the number of trips permitted in a given weekly period.[1] On December 10, 1948, petitioner's operations were for the first time restricted by the Board's ten "interpretations" of irregular and regular service as set forth in Regulation Serial No. ER-136 (J. A. 57-63) and later amended by Regulations Serial No. ER-151 and ER-154 (App. to Pet. Brief pp. 53-59).

Respondent makes the assertion (Brief in Opposition, p. 9) that the 1948 regulation "did not alter or contract the privileges of the exempt carrier. It aimed simply at providing guidance to the industry." Irrespective of whether it was "aimed at providing guidance to the industry," nevertheless it was in the form of a regulation which by its terms limited and restricted petitioner's license. That this statement of respondent that the 1948 regulation did not alter or contract petitioner's privileges is erroneous is apparent from simply reading and comparing the regulation in effect when petitioner commenced business (J. A. 358) with the charts contained in the regulation adopted December 10, 1948 (J. A. 59-63). These charts were not in effect prior to December 10, 1948. The original license contained no measure or standard for determining when flights were to be considered irregular or infrequent. Thus, it will be seen this 1948 regulation clearly established for the first time a measure or standard for

[1] Section 292.1 of the Economic Regulations, Civil Aeronautics Board, (J.A. 57-63 and Pet. for Cert. 40-47). Section 292.1 of the Economic Regulations was recodified as Part 291 of the Economic Regulations, effective July 1, 1949, 14 F.R. 3546.

determining whether flights were to be considered irregular and infrequent. Therefore, the record amply supports questions 1-3 (Pet. pp. 3-4)[2] contra to respondent's charge that these questions are not presented by the record in this case.

Petitioner urges that this regulation should legally be regarded as amending petitioner's previously existing license. Therefore, adjudicatory hearings for the benefit of persons holding such licenses were necessary before it could be lawfully promulgated.[3]

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[2] Questions 1 and 3 in the Petition are as follow:

"1. Where a license granting operating authority is issued by the Board to an air carrier, which acquires property and business while operating thereunder, may the Board thereafter issue and lawfully enforce a new regulation which amends the carrier's license and substantially injures and destroys its property interests and business by diminishing and curtailing its operating authority, in the absence of an adjudicatory hearing upon the regulation prior to its issuance as prescribed by the Administrative Procedure Act?"

"3. Where a license is granted pursuant to a regulation adopted through proper rule-making procedure, which regulation defines permissible operations in general terms (i.e., 'does not hold out a regular service'), and a licensee commences operations and makes a business investment in reliance upon such regulation, may the agency thereafter lawfully issue a document called an 'interpretation' but having the force of a regulation, which document substantially curtails and restricts the prior definition of permissible operations without complying with the rule-making procedures set forth in the Administrative Procedure Act, 5 U.S.C. 1008(b)?"

[3] The court below in its "statement" accompanying its certificate to this Court filed June 12, 1952, in the case of *Civil Aeronautics Board, et al.* v. *American Air Transport, Inc., et al.*, No. 11,115 in that court (and subsequently No. 126, October Term, 1952, in this Court) stated:

"No majority of this court is able to agree upon a disposition of this case. *The three judges are in agreement that, if a new regulation should legally be regarded as amending existing licenses, adjudicatory hearings for the benefit of existing licensees are necessary.* (Italics supplied.) The differences are as follows:

"One judge would affirm the judgment of the District Court for these reasons: He thinks the new Regulation inserts into the appellees' pre-existing license a crippling limitation of the number of

The regulation in effect when petitioner started business (J. A. 358) provided:

> "An Irregular Air Carrier * * * (3) which *does not hold out to the public,* expressly or by a course of conduct, that it operates one or more aircraft between designated points, or within a designated point, *regularly or with a reasonable degree of regularity* upon which aircraft it accepts for transportation, for compensation or hire, such members of the public as apply therefor or such property as the public offers. No air carrier shall be deemed to be an Irregular Air Carrier

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irregular trips permitted thereunder, the licenses theretofore having been unrestricted in that respect, which will substantially injure and in large part destroy the existing property and business of the appellees. He thinks the insertion of such a restriction into the licenses originally unrestricted constitutes an amendment of the licenses which, under the Constitution and the statutes, is invalid without an adjudicatory proceeding.

"One judge would reverse the judgment of the District Court, being of the opinion that, when licenses are issued under a regulation of a licensing agency, an amendment of the regulation which defines its terms in ways not shown to be arbitrary or capricious, duly adopted by a rule-making procedure and without an adjudicatory proceeding as to any affected licensee, is not to be regarded as amending licenses and is valid although it will have the effect of destroying substantial parts of the business of licensees.

"One judge is of opinion (1) that the decisive question is whether the specific prescriptions of the new Regulation are or are not a proper, or reasonable, definition of the undefined terms ('regularly or with a reasonable degree of regularity') of the original licenses and (2) that that question is a question of fact which must be determined upon factual criteria, devised from studies of actual operations of regular carriers and of irregular carriers, similar to the criteria utilized by the three-judge court in Brady Transfer & Storage Co. v. *United States* for like purposes under the Motor Carrier Act, and similar to the data which the Board says it used in formulating the Regulation here involved. Since the present record contains no evidence here of that sort, this judge would remand the case to the trial court for the receipt of such evidence and a finding of basic facts and an ultimate finding therefrom as to whether the new Regulation does or does not in fact change the terms of the existing licenses." (Italics supplied.)

[Note: This latter judge's opinion was later adopted by all three judges in the court below in the *American Air Transport* case.]

unless the air transportation services offered and performed by it are of such infrequency as to preclude an implication of a uniform pattern or normal consistency of operation between, or within, such designated points. Within the meaning of this definition a 'point' shall mean any airport or place where aircraft may be landed or taken-off, including the area with a 25-mile radius of such airport or place." (Italics supplied)

The regulation in effect when American Air Transport, Inc. commenced business provided:

"every air carrier which engages solely in non-scheduled operations shall be exempt from the provisions of Section 401 and all other provisions of Title IV of the Civil Aeronautics Act . . . .

"Within the meaning of this regulation any operation shall be deemed to be nonscheduled if the air carrier *does not hold out to the public,* by advertisement or otherwise that it will operate one or more airplanes between any designated points *regularly or with a reasonable degree of regularity* upon which airplane or airplanes it will accept for compensation or hire such members of the public as may apply therefore (sic) or such express or other property, as the public may offer." (Italics supplied)

A comparison of the language of the two above-quoted regulations in effect when each of these carriers started its operations shows that they are substantially the same.

The licenses of petitioner and American Air Transport, Inc., based upon the same wording "regularly or with a reasonable degree of regularity," were revoked upon the Board's findings that they operated outside the terms of their licenses in that they operated "regularly or with a reasonable degree of regularity."

If the regulation of December 10, 1948, was not an amendment of petitioner's previously existing license as respondent contends, then the decisive question turns on the mean-

ing of the terms "regularly or with a reasonable degree of regularity" as set out in petitioner's original license. These terms are identical in both the license of petitioner and the license of American Air Transport. The court below in the *American Air Transport* case held these words to be "undefined terms of the original licenses." That court further held that the meaning of these terms could only be determined upon factual criteria obtained from evidence based upon studies of actual operations of both regular and irregular carriers. In the *American Air Transport* case the court below applied the same criteria in that case which were utilized by the three-judge court in *Brady Transfer and Storage Company* v. *United States.*[4]

If the Board has convicted petitioner upon the terms of its original license as respondent asserts, Brief in opposition pp. 7, 10, then we have the situation where the court below in the *American Air Transport* case, decided four months and ten days after its decision in the instant case, held that the terms "regularly or with a reasonable degree of regularity" were *undefined terms.* Although the same identical terms are used in petitioner's license and in the *American Air Transport* case, that is, "regularly or with a reasonable degree of regularity," the court below refused to convict American Air Transport until the "undefined terms" had been defined by the trial court upon evidence taken based upon operations of regular and irregular air carriers. Such undefined terms have not been defined in the instant case. Petitioner has been convicted and is about to be executed under the "death edict" decisions of the Civil Aeronautics Board and the court below, notwithstanding the fact that the regulations which petitioner has been found guilty of violating are expressed in "undefined

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[4] 80 F. Supp. 110 (S. D. Iowa 1948), *Aff'd.,* 335 U. S. 875, 93 L. Ed. 418, 69 S. Ct. 239 (1948).

terms." In other words, petitioner here is in the same position as a person who has been convicted of an alleged crime for which he is about to be executed, when that crime is described in "undefined terms." For the same reasons that this Court would not uphold such a conviction, much less permit a person to be executed upon conviction of an alleged crime that is set forth in a statute describing the crime in *undefined terms*, so this Court is urged by petitioner to not permit this petitioner, a going business concern, to be prohibited from continuing its business because of alleged wilful violations of these *undefinable terms* "regularly or with a reasonable degree of regularity," which were contained in its original license.

How can petitioner be held to have operated "regularly or with a reasonable degree of regularity" until it has been determined what those terms mean? And that has not been determined in the instant case.

As in the case of *Civil Aeronautics Board* v. *American Air Transport, Inc., supra*, the present record now before the Court in the instant case does not contain evidence of studies of actual operations of regular carriers and of irregular carriers similar to the criteria utilized by the three-judge court in *Brady Transfer and Storage Company* v. *United States, supra*, which this Court affirmed in 335 U. S. 875. Therefore, in justice to petitioner, and in the interests of fair dealing on the part of an agency of the United States Government with its citizens, it is respectfully urged that the Court should grant this petition.

After this Court dismissed the certificate of the court below [5] in *Civil Aeronautics Board* v. *American Air Trans-*

[5] Opinion of the Court entered Oct. 20, 1952, in *Civil Aeronautics Board* v. *American Air Transport*, Case No. 126, October Term, 1952. Pet., pp. 2, footnote 2, sets forth the opinion of this court in that case. The questions were certified by the court below in the following language:

"This court is unanimously of opinion that the question presented is of far-reaching and fundamental importance in the field of admin-

port, the two judges of the panel of the court below that heard that case who previously voted for affirmance and reversal respectively on November 20, 1952, changed their vote, voted with the third judge for remand (see footnote 3) and the court below then returned that case to the lower court with the following *per curiam* opinion:

> "Per Curiam: We certified this case to the Supreme Court. U. S. App. D. C. —, — F. 2d —. On October 20, 1952, the Supreme Court dismissed the certificate. — U. S. —. The circuit judge who formerly voted for affirmance and the circuit judge who formerly voted for reversal now concur with the circuit judge who formerly voted for remand. The case is remanded to the District Court for further proceedings in accordance with the opinion of that judge as set forth in our certificate filed June 12, 1952.
>
> Remanded."

The direct conflict between the decision of the lower court in the instant case and the decision of this Court in *Brady Transfer & Storage Co.* v. *United States, supra*, has been emphasized by the recent action of the court below after rendering its decision in the instant case, in remanding

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istrative law. Therefore, this court respectfully requests the instructions of the Supreme Court upon the following question: (Italics supplied)

"Where operating authority is granted by a regulatory agency and a private company operating thereunder acquires property and business in so doing, is a new regulation of the agency which in fact substantially injures or in large part destroys such property interests or business

(1) void as to that licensee unless an adjudicatory hearing is held, because it is on its face an amendment of his license; or

(2) valid if adopted by a rule-making procedure, provided the new regulation merely defines the terms of the old in ways not shown to be arbitrary or capricious; or

(3) does its validity as to that licenseee depend upon a finding of fact that it does or does not in fact vary the terms of the license; or

(4) does its validity depend upon some other condition?"

to the District Court the case of *Civil Aeronautics Board* v. *American Air Transport, et al., supra,* for the receipt of such evidence or criteria as was deemed essential in the *Brady* case, to-wit, a finding of basic facts and an ultimate finding therefrom as to whether the new regulation does or does not in fact change the terms of the existing licenses.

Further, the recent decision of the court below in the case of *Civil Aeronautics Board* v. *American Air Transport, et al., supra,* in which a similar question involving the issuance of a new regulation, after the issuance of an operating license, by the Civil Aeronautics Board, limiting the permissible frequency and regularity of operations, demonstrates an intra-circuit conflict.

The same terms "regularly or with a reasonable degree of regularity" are in both the licenses of American Air Transport and petitioner. In the case of the former the court below refused to decide if American violated that term of its license because that term is "undefined" and it refuses to decide if the Regulation involved in that case does or does not in fact change the terms of the existing license until the "undefined" terms are defined. In the instant case, though alleged violation of the same "undefined" terms is the very crux of the case against petitioner, the court has held it violated those "undefined" terms and that finding and as well the further finding that the Regulation here involved did not in fact change the terms of the existing license have been made without "a finding of basic facts and an ultimate finding therefrom" by either the court or the Board.

Obviously, the court below could not be right in its decisions in both cases. Petitioner respectfully submits that it was right in the action it took in the *American Air Transport* case because that action was in conformity with the previous decision in the case of *Brady Transfer & Storage Co.* v. *United States, supra,* which this Court affirmed; and

was wrong in the action it took in the instant case. This situation merits the supervision of this court by review upon the granting of this petition.

When "regularly or with a reasonable degree of regularity" shall have been defined by the courts in the *American Air Transport* case, it may well appear that with that definition applied to petitioner's alleged violations, it in fact did no wrong.

Petitioner meanwhile will have been put out of business, will have lost its business and lost its customers and will have lost the traffic it has built up since 1948; its organization of highly trained, competent and efficient personnel skilled in air transportation will have been disbanded, most of its investment will be lost and its business ruined. Petitioner may then realize, after it is too late, that it has been convicted under a regulation later held invalid. By granting this petition, this Court can thus avoid this unjust, unfair and inequitable situation.

Respondent, without justification, asserts in its footnote 5 on page 9 of Brief in Opposition that petitioner has not presented the contention advanced below that the Board's standard of regularity is void for vagueness. This assertion overlooks the statement appearing on page 12 (paragraph 4) of the petition. While it is true the word "vagueness" was not used, nevertheless the words "invalid for uncertainty" as used by petitioner certainly convey the same idea as "vagueness." In order that there may be no question as to petitioner raising this question, the Court is now urged that the terms "regularly or with a reasonable degree of regularity" used in petitioner's license are "undefined terms." They are meaningless until they are defined. The lower court has held in the *American Air Transport* case that they cannot be defined without evidence, and there is no such evidence in this case. Further, if the regulation of December 10, 1948, is meant to be, as it is, an

amendment of petitioner's license by way of a "definition" of the "undefined" terms used therein, then it is unenforceable against petitioner if it alters the meaning of the terms "regularly or with a reasonable degree of regularity" as contained in petitioner's original license, because it was put into effect after the issuance of petitioner's license and without complying with the Administrative Procedure Act.

In addition, these regulations of December 10, 1948, and July 1, 1949, are so vague, indefinite, and uncertain that they are void and invalid. They are also contrary to the purpose of the Civil Aeronautics Act as set forth in Section 2 of that Act.[6] They are also discriminatory because they impose restrictions without any reasonable relation to the purpose of the Civil Aeronautics Act.

Respondent in its Brief in Opposition takes the position that Section 9 (b) of the Administrative Procedure Act,

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[6] Section 2 of the Civil Aeronautics Act (52 Stat. 980, 49 U.S.C. 402) provides: "In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

providing that before a license shall be revoked the licensee shall be given warning and accorded an opportunity to achieve compliance, does not apply because the Board and the court below have found that the violation here charged was "willful." Petitioner respectfully submits that the terms "regularly or with a reasonable degree of regularity," as used in the regulation in question, are "undefined terms," as held by the court below in the *American Air Transport* case; and there can be no "willful" violation of a regulation couched in "undefined terms." The word "regularly" is a relative term, and must be compared with operations of regular and irregular carriers as required in the case of *Brady Transfer and Storage Company* v. *United States, supra.*

The Administrative Procedure Act attempts to correct many evils which developed in the administrative process. One such evil, according to Congressman Walter, is "the very severe consequences of the conferring of licensing authority upon administrative agencies * * *. The purpose of this section is to remove the threat of disastrous, arbitrary and irremediable administrative action."[7]

The Board finds that petitioner "willfully" violated the Civil Aeronautics Act, and at the same time the Board refuses even to look at evidence of the public interest tendered by petitioner which would show (1) that there was a desperate need for petitioner's services, (2) that other carriers were unable to supply the air service needed, and (3) that the application of rules governing domestic interstate air transportation within the states should not be applied to overseas transportation between the states and Alaska.

Unless such evidence is considered, the Board could not properly find that petitioner acted "willfully," except in the arbitrary manner which the Board here followed.

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[7] Congressional Record, May 24, 1946, p. 5759.

The Administrative Procedure Act is designed in part to limit such arbitrary action. This Court should grant the petition for certiorari to make clear that the exception in 9 (b) of the Administrative Procedure Act cannot be used to continue the very arbitrary action it was designed to correct.

The decision of this Court upon the questions presented here will not only affect petitioner but the questions involved are of vital importance to all large irregular air carriers in this industry which serves the small businessmen, the middle class citizens of America and the lower salaried population by providing them with low-cost air transportation which would not otherwise be available to them. Attention is invited to the *amicus curiae* brief submitted by Aircoach Transport Association, Inc., the trade association of this industry.

It is significant that respondent's Brief in Opposition does not deny that this case presents a question of public importance with respect to the impact upon the irregular carrier segment of the air transportation industry of a Regulation limiting the frequency and regularity of the operation of such air carriers; that this Regulation is presently being enforced against many air carriers in proceedings now pending before the Civil Aeronautics Board and proceedings under judicial review in which the validity of such Regulations is challenged, as here; and this is the first time this question is before this Court for decision. Unless this Court takes jurisdiction and decides this important question in the field of administrative law, the validity of this and similar Regulations adopted in the same way by other Government agencies without complying with the requirements of the Administrative Procedure Act will remain unsettled, and a decision by this Court now will be helpful to every other irregular air carrier, of which 55

operated more than 55,000,000 passenger and cargo miles between July, 1949 and July, 1950 (J. A. 637).

Respondent does not deny that the Senate Select Committee on Small Business which investigated the status of the carriers in the class to which petitioner belongs found these carriers required a bare minimum of 14 to 15 flights a month between the same points to be economically necessary to justify their continued operation and that this Regulation jeopardizes the economic strength of these carriers to such an extent that they cannot continue their operations and meet their operating expenses.

Neither does respondent's Brief in Opposition deny, as pointed out by the Senate Committee, that (Pet., p. 12) the regulation of irregular carriers involves a broad public interest—that of determining the kind of civil aviation which America is to have in the future and the non-scheduled air carriers constitute an asset that the nation ought not to lose.

Conclusion

As the issues here presented are vital to the irregular air carrier industry, and the general public who utilize its low-cost transportation, and are of far reaching and fundamental importance in the field of administrative law for which there is a precedent-making need for a pronouncement by this Court of the governing principles, it is respectfully submitted that the granting of the writ in this case is of sufficient importance to warrant such action by this Court.

Respectfully submitted,

WARREN E. MILLER,
Counsel for Petitioner,
910 17th St., N. W.,
Washington 6, D. C.

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IN THE

Supreme Court of the United States

October Term, 1952

No. .....

AIR TRANSPORT ASSOCIATES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

BRIEF OF AIRCOACH TRANSPORT ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTION

The Aircoach Transport Association is an organization composed of some forty Large Irregular Air Carriers. The instant petitioner is a member of this Association. The carriers who form the Association provide air transportation under "Letters of Registration" and are classified as Large Irregular Carriers. They operate over 800 million passenger-miles per year. They constitute an important part of the national air transportation system.

In this instant cause the Civil Aeronautics Board revoked the Letter of Registration held by the petitioner. This Court is asked to review the validity of that action. Because of the present and future importance to the members of this Association, of the issues raised in this cause, the Association submits the following brief in support of the petition for a writ of certiorari.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Status of the Regulations Is Confused and Confusing.

The Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 937, 49 U.S.C. 401 *et seq.*)[1] creates a system of air transportation in which air carriers obtain certificates of public convenience and necessity from the Civil Aeronautics Board before engaging in business. Instead of issuing certificates for non-scheduled (now called "irregular") air transportation, the Board chose to issue "Letters of Registration" to irregular carriers. This was done pursuant to an economic regulation[2] issued by the Board in 1947 in accordance with proper rule-making procedure. An irregular carrier was defined, in that regulation, as a carrier which does not hold out a regular service to the public, and whose services "preclude an implication of a uniform pattern."

Thereafter, on December 10, 1948, the Board issued an "Interpretation No. 1,"[3] without any notice or hearing of any kind. This Interpretation utilized the technique of arranging actual flights on a calendar system, rather than examining the service which was held out to the public, as the basis for determining "regularity."

On May 20, 1949, the Board, through rule-making procedures, adopted a new definition of irregular carriers, which again was based upon the actual flights made rather than the holding out. This is the 1949 regulation.[4]

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1 Quoted at page 31 of the Petition for Writ of Certiorari.
2 Quoted at page 35 of the Petition for Writ of Certiorari.
3 Quoted at page 47 of the Petition for Writ of Certiorari.
4 Quoted at page 53 of the Petition for Writ of Certiorari.

Thus, the changes in the regulations have the effect of altering and modifying the original licenses issued to irregular air carriers. The change alters the type of service authorized as well as the extent to which the service may be provided.

§ 9(b) of the Administrative Procedure Act provides, in pertinent part:

> "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

Although the regulations aforesaid did, and continue to, attempt to modify licenses initially issued, none of those regulations was adopted in accordance with the mandatory provisions of § 9(b) of the Administrative Procedure Act.

As a result of the Board's actions since 1947, the irregular carriers have a bona fide dispute with the Board over the type and extent of service they are licensed to perform, and the authority of the Board to modify their licenses without adjudicatory-type hearings.

The new regulations issued by the Board actually are directed, of their own force, to take away existing operating rights held under a license. There is a sufficient degree of property right involved to invoke constitutional due process requirements for a hearing.[5]

Unless this Court grants the writ, and authoritatively states the extent to which the Civil Aeronautics Board may alter licenses without adjudicatory hearings, there will be no stability in an important segment of the country's air transport system.

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[5] See Netterville, *The Administrative Procedure Act: A Study in Interpretation*, 20 George Washington Law Rev. 1, 15 (1951).

There is always the further prospect that new and more restrictive interpretations and regulations may be issued in the same manner. For example, one such regulation, which would limit the carriers to only three trips per month between principal cities, is now stayed only until a pending case is concluded.[6]

It was thought that this Court would pass upon this far-reaching issue when the Court of Appeals for the District of Coulmbia Circuit certified questions in the case of *Civil Aeronautics Board et al.*, v. *American Air Transport, Inc., et al.*, No. 126, October Term, 1952. This Court, however, dismissed the certificate and the Circuit Court remanded the cause to the District Court for further proceedings.[7]

The instant proceeding, therefore, is the vehicle in which this issue arises. It is of paramount importance to the forty members of the Association, the operations of all of which will be influenced by the decision of the Court. It is of great importance to the supplying of adequate air transportation to meet the public convenience and necessity. The present status of the regulations is confusing; the irregular carriers are necessarily in doubt as to the type and extent of the service they are permitted to provide under their existing licenses. This Court has the opportunity to terminate much of this distressing uncertainty and hardship by granting the writ in the instant case.

II. This Court Has Never Construed These Sections of Statutes Involved.

The instant case presents a fundamental issue under the Administrative Procedure Act. A primary issue is raised with respect to the extent to which the Administrative Procedure Act protects licenses. This Court has not construed the Act in this respect. The United States Court of Appeals

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[6] Civil Aeronautics Board Regulation 291.29, Amendment No. 5, 16 F. R. 6503.

[7] *Civil Aeronautics Board et al.*, v. *American Air Transport et al.*, App. D.C. —— F. 2d ——, decided November 20, 1952, No. 11,115.

for the District of Columbia Circuit has held that a license may not be taken away without due process of law. *In re Carter*, 177 F. 2d 75. In the instant case, the Board has attempted to amend and restrict the license right by issuing regulations which have that effect. The validity of such regulations, under the Administrative Procedure Act, should be determined by this Court.

III. Conflicts of Principle Should Be Resolved by This Court.

The Board, by an interpretation and re-definition of existing regulations, changes the business and license of an air carrier, and then orders the carrier to cease all operations for an alleged violation of the "interpretation." In the motor carrier field, the Interstate Commerce Commission reached exactly the opposite conclusion. The Commission had a definition of "commercial zone" which could reasonably have been construed to include Windsor in the Detroit zone. Thereafter, the Commission changed its definition to eliminate Windsor. However, the Commission held that an existing licensee could continue to operate to Windsor (until his application was heard) because the change in the Commission's position was the equivalent of a "withdrawal" of a license within the meaning of § 9(b) of the Administrative Procedure Act. *John E. Merrifield Common Carrier Application*, No. M. C. 112991, decided October 16, 1952.

The principles applied by the Commission to the motor carrier are exactly opposite from those applied by the Board to the irregular air carrier. This conflict in principle should be resolved by this Court.

CONCLUSION

The issues are of vital concern to the irregular air carrier industry; they are of such concern to the whole air transportation industry, domestic and foreign. The issues are important to that part of the public which relies upon the irregular carriers' service. There is a precedent-making

need for a pronouncement by this Court of the principles of law to govern the application of confusing regulations. We submit that the grant of the writ in this case would be of sufficient public consequence to warrant such action by this Court.

Respectfully submitted,

GEORGE M. MORRIS
ALBERT F. BEITEL
Counsel for Aircoach Transport Association, as Amicus Curiae

MORRIS, KIXMILLER & BAAR
905 American Security Bldg.
Washington 5, D. C.
Of Counsel

Dated: Washington, D. C.
November 29, 1952